Deutsche Börse Group response to the Call for Evidence on the EU regulatory framework for financial services

Introduction

Deutsche Börse Group (DBG) organises and operates markets in financial instruments. As an integrated provider of financial services regarding trading, clearing and settlement of financial instruments, DBG is affected by a multitude of legislative and administrative acts.

Furthermore, DBG group companies cover the whole range of Financial Markets Infrastructure (FMI) providers: Trading venues (regulated markets and MTFs), Central Counterparties, Central Securities Depositories, Securities Settlement Systems as well as a Trade Repository and data reporting services providers. With a business model whose economic viability and competitiveness is largely driven by cost-intensive investments in leading-edge technology, DBG is reliant on a predictable regulatory environment which creates as little cross-border inefficiencies as possible. Therefore, it is in our vital interest to act in a regulatory landscape shaped by comprehensive and coherent legal principles and consistent rule application.

DBG supports regulatory efforts to improve the orderly functioning of markets, to enhance the resilience of single entities as well as systemic infrastructures and to promote growth and fair competition on a level playing field. Financial legislation should favour transparent markets, risk managed trading/ clearing/ settlement and orderly operations and thereby be guided by the principles of a reduction of regulatory arbitrage between jurisdictions, the avoidance of double regulation, clear and coherent terminology as well as consistent rules across all dossiers. As such, the field should be tilted in favour of centralised infrastructure as the ways in which to organise, control and manage markets to the benefit of all.

The “Call for Evidence” initiative of the EU Commission is the right way to start with “regulatory reconciliation” and check whether there are any unintended consequences, given the large amount of legislation put in place and to understand the interactions between them and their combined impact.

Some corrections in implementation rules seem to be useful.

However, this “correction exercise” should be done carefully with regard to financial stability, being a fundamental prerequisite for growth. It’s important to find the right balance between financial stability and growth as well as risk sensitivity, simplicity and stability of rules over time.

Achieved and agreed corner stones – like the central clearing of OTC derivatives, bilateral margining etc. – should not be undermined/ revised as this rule was designed to strengthen financial stability. Promoting financial stability is a necessary prerequisite for growth and job creation; a lack of financial stability leads to economic instability, as seen in the recent crisis. In order to minimise systemic risk and create well-functioning markets, both safety and integrity need to be ensured. It is **important that the G20 goals and the European regulation (e. g. EMIR, CRD IV, CSDR and MiFID II) with a focus on increasing financial stability continue to be implemented and are truly applied and the services of market infrastructures promoted**, as they deliver financial stability. Maintaining and further promoting financial stability is essential in order to provide certainty to investors both in Europe and internationally.

The call for evidence initiative under the umbrella of the Capital Markets Union should not be seen as “de-regulation”, but rather “re-regulation”. Loose ends need to be reconciled with regard to finalisation, implementation and application of existing regulatory initiatives, making sure that these avoid any unintended consequences. Surplus and misdirected regulation raises costs for businesses, utilising valuable funds that could instead be turned towards innovation and growth creation. The overall aim should be to establish a more attractive environment for companies and investors.

In the last years the European Commission launched important regulatory initiatives (BRRD, CRD IV/CRR, MiFID II/MiFIR, EMIR, CSDR, AIFMD, UCITS V, FiCOD I, and Solvency II etc.) that should be integrated under the umbrella of the Capital Markets Union. The Capital Markets Union should reduce the regulatory burden to what is essential, build up an efficient supervisory structure and ensure a global level playing field. Existing regulatory initiatives should be aligned with and not contradict the goals of the Capital Markets Union project (as the introduction of an FTT in only 10 countries would do).

Given the global nature of capital markets, coordination of supervision both within and outside Europe is important in order to **ensure a global level playing field and maintain European competitiveness**. The overall aim should be to establish an attractive environment for companies and investors. Key elements are ensuring regulatory reconciliation/ consistency check of regulatory initiatives, avoiding regulatory arbitrage; maintain efficient supervision and third country regimes.

DBG supports any measures to make legislation more coherent and to improve uniformity, simplicity and applicability of European financial law – for competent authorities as well as for providers, users and consumers of financial infrastructures, services and products.

Deutsche Börse Group has commented to the public consultation of the European Parliament – Committee on Economic and Monetary Affairs on “Enhancing the coherence of EU financial service legislation” in June 2013. Although many changes to the EU financial services legislation has occurred since then most of the points rose at the time are still valid content wise. As such, we do want to refer to our response as a further source of information also within this consultation. Our response can be found at the following link[1].

The Call for Evidence should help regulators and supervisors to see how existing and recently implemented regulations work in practice, understand the impacts and ensure any overlaps or misinterpretations are addressed, clearly defining the gaps and any market failures.

Executive Summary

Issue #1: Unnecessary regulatory constraints on financing

Example 1
Please rethink the proposal of the financial transaction tax as this tax would not be in line with the principle of causation of the financial crises as the **costs of taxation would have to be borne by small and medium enterprises via growing capital-raising costs**.

Example 2
Please re-calibrate the overall capital requirements. The three dimensions of **strengthened capital rules** ((i) increased levels / quantity of capital, (ii) increased quality of capital and (iii) increased consumption of capital) are – especially also taking current developments on the Basel level into account – **gearing up each other**. The potential addition of a non-risk sensitive leverage ratio as a binding minimum is further **adding to the capital constraints**. These increased requirements lead to a reduced profitability in combination with a high demand for additional equity. Consequently, there is a fair chance that instead of increasing equity the **risk positions have to be reduced** and **loan facilities will be limited**.

Example 3
The **MREL is added on top** of the components of solvency under CRD IV / CRR which already consider a substantial amount of increased resilience. The introduction of the capital conservation buffer, the countercyclical buffer, the buffer for systemically important banks and the buffer for systemic risk already captures part of the aim the MREL is designed for. Therefore **the elements setting the targeted size for the MREL should be reconsidered** and the **absolute requirements** should be **scaled to a reasonable amount**.

[1] http://deutsche-boerse.com/dbg/dispatch/de/binary/gdb_content_pool/imported_files/public_files/10_downloads/11_about_us/Public_Affairs/Position_paper/20130614_ECON_Consultation_Coherence-Questionnaire.pdf

Issue #2: Market liquidity

Example 4

Market-based and regulatory drivers are **reducing market liquidity**. Dealer risk tolerance has notably declined and bank balance sheets are strained given stricter capital requirements. Deutsche Börse Group is concerned that the way **MiFID II Level 2 text (regulatory technical standards) for market making** are currently drafted will increase costs and risks for market makers and consequently **adversely affect liquidity formation in the order book**.

Example 5

Tightened rules for banking supervision (but also Solvency II for insurance companies) **have increased the demand for low risk / highly liquid securities** with **low levels of market and credit risk** (mainly government bonds). The demand will grow over time taking the phasing-in arrangements of Basel III / CRD IV / CRR into account.

In order **to keep risk low or even reduce risk but avoid regulatory penalties (higher capital or liquidity requirements), credit institutions will undertake measures to avoid situations of (regulatory) under-collateralisation** and will **require higher haircuts above reasonable levels** which will further **reduce market liquidity**. In order to allow for an adequate liquidity regime and an appropriate quantitative capturing of the liquidity risk, i.e. the **LCR should be reviewed regularly** for its appropriateness.

Issue #3: Investor and consumer protection

Example 6

Under the **revised MiFID II / MiFIR framework** tightened **investor protection rules** were introduced. With the objective of **improving the information of retail investors** the **documentation duties of banks have been increased**. Banks across Europe will have to document their investment advice in future, although experience shows that **overwhelming documentation duties already have negative side effects**. As a consequence, **many banks abandoned its investment advice in shares** significantly or completely and **retreat from investment advice in other securities like bonds and investment funds**. This development will further **harm the equity culture** among retail investors, which is **already underdeveloped in the EU** compared to other jurisdictions like the US. **Promote education in order to achieve an economy based on knowledge and innovation**, including measures to **improve financial and economic literacy**. Only well-defined investor protection rules are crucial for a changing landscape.

Example 7

The introduction of an FTT would significantly and **negatively affect private households** and the real economy alike. It will not stabilize capital markets and will not generate the expected revenue but will rather hinder growth and **increase risks for investors**. The **tax burden will be**

shifted to the end users of capital markets and non-financial companies. **For private households almost all forms of private old-age provision and wealth accumulation are negatively affected by the FTT**.

Example 8
Directive 97/9/EC introduced rules for investor-compensation schemes to cover losses investors may face when using investment firms under Directive 93/22/EEC (meanwhile replaced by Directive 2014/65/EU). **Operators of regulated markets are not regarded as investment firms and this in our view holds true in case they operate a MTF or an OTF. As such, they have prior to MiFID II not been in scope of the investor-protection scheme.** We feel that the inclusion of operators of MTFs or OTFs be them investment firms or market operators with the only investment services performed being the operation of MTFs or OTFs or **both does not fulfil the aim of directive 97/9/EC** and as such is **going beyond the needs for investor protection**.

Issue #4: Proportionality / preserving diversity in the EU financial sector

Example 9
Due to the current wording of Article 4 (1) No. 2 lit c. **CRR operators of MTFs and OTFs are regarded as an investment firms under CRR**. This leads to the fact they have to fulfil solvency requirements under Article 95 CRR, disclosure requirements under part VIII CRR and their initial capital requirement is not in scope of Article 31 CRD IV. Consequently, operators of MTFs or OTFs without additional licenses or only offering other investment services which are covered by Article 4 (1) No. 2 lit. c CRR have to fulfil **more stringent requirements than those MiFID-investment firms exempted from the CRR investment firm definition** of Article 4 (1) No. 2 lit c CRR (see also the EBA report (EBA/Op/2015/20) for further evidence).

Example 10
CSDs are allowed to perform ancillary banking services if certain conditions are fulfilled. Similarly, dedicated **credit institutions are allowed to perform banking services for CSDs**. However, in both cases the **banking activities are strictly limited** and strong additional requirements for risk management, liquidity management, credit business and collateral usage are imposed by CSD-R and the related level 2 texts. As such, the **allowed banking business for a CSD is by far more restricted and limited than that of ordinary credit institutions**.
CSD-R imposes the application of the **"strictest" banking rules (see recital 48 CSD-R) which in principle are to be read as the rules for G-SIBs under CRR**. Albeit we agree to the systemic importance and systemic risk such CSDs have for the well-functioning of the financial markets, we **cannot agree to impose <u>strictest</u> banking standards to a limited banking business.**
Supervision of CSDs / CSD service banks by the ECB as **significant institutions under the SSM should be excluded** as the SSM has a different focus. **CRR / CRD IV rules should only apply to CSDs** taking into account necessary modifications, in case they **would apply anyway** and not just because it is a CSD offering banking type of ancillary services.

Example 11

The **Banking Recovery and Resolution Directive (BRRD)** is applicable to all credit institutions in the European Union. The respective rule-set is **therefore applicable in full to CSDs and CCPs also operating with a banking license**. However, this is **neither appropriate nor proportionate** as those requirements are not tailored for FMIs. Explicitly the bail-in rules and the MREL requirements do not fit for FMIs also operating with a banking license. For CCPs the current default waterfall already captures a lot of the requirements. The current dedicated discussions for a recovery and resolution regime for CCPs should be used to close any existing gap. For CSDs offering banking type of ancillary services, it is mainly the credit function which triggers tighter rules. Therefore, **recovery and resolution regimes for FMIs should be tailored for the main regulated activity** and double regulation should be avoided.

Issue #5: Excessive compliance costs and complexity

Example 12

Diverse rules in different legislations shall enable **competition between FMIs**. Among others prices shall be granted at reasonable commercial terms and access to and interoperability between infrastructures shall be granted. In the respective recitals the reference to the competition law is made. These kinds of regulations have two short comings: **They follow a functional approach** and therefore only address the FMI providing certain rules but not other market participants (investment firm, data vendor, custodian or even third country FMIs). Moreover, these rules ignore that we have a functioning European competition law in place. Many of these rules add additional cost to the services provisions by FMIs and are not in line with global standards. **Please ensure level playing field with regard to other market participants.**

Example 13

CRD IV, CRR and the related level 2 texts (plus national implementation and EBA guidelines, etc.) **have tightened the rule set for credit institutions dramatically**. The level of detail of the rules and the need to have a **very granular data base** in order to fulfil regulatory requirements is more than burdensome. Please consider to simplify the banking framework (see issue #1).

Issue #6: Reporting and disclosure obligations

Example 14

In case the EU considers a Consolidated Audit Trail (for t+1 data including all sensitive data required by regulators) as a potential and **reasonable option for the EU build up an efficient supervisory structure, any potential inclusion into future regulation should at least ensure** the following:

- that ESMA – who is already working on t+1 consolidation – would still consider a Consolidated Audit Trail (CAT) a necessary tool, and if that is the case
- that a detailed and fact-based study will be conducted upfront including all relevant data sources from the beginning in order to avoid any misinterpretations
- that a global level playing field is being assured.

Any one-to-one comparison with the US, which is not fully based on fact-based research, should be avoided by all means.

Example 15

We support the idea of **curbing dark trading in equities**. However, due to the operational complexities involved, we suggest **replacing the current "Double Waiver Cap Regime" (MiFIR (Art 4 and 5) for the Reference Price Waiver and the Negotiated Trade Waiver with a far simpler model**. The model we propose envisages that only orders of a minimum size, but smaller than Large-in-Scale (e.g., 80% of Large-in-Scale) can be subject to these two waivers.

Example 16

Limit complexity, extent and granularity required in the pillar III disclosure requirements (CRD IV / CRR).

Issue #7: Contractual documentation

Example 17

Rules governing investment advice of investment firms should be adjusted. An example: **Experienced retail investors should have the option to waive the obligation that the suitability of the investment advice has to be recorded** ("suitability report" Article 25 (6) MiFID II). For the benefit of effective investor protection an environment providing for widespread financial and economic literacy should be promoted instead of pursuing an ecosystem with even more regulatory requirements for issuers.

Issue #8: Rules outdated due to technological change

Example 18

EMIR / ESMA Article 27 on Portfolio Margining contains requirements around correlations between individual products and in particular terms like reliability of correlations are not well-defined from a mathematical point of view. Hence, ESMA Article 27 is not model neutral. We suggest amending this Article to make it model neutral but still ensure prudent, high minimum standards.

Issue #9: Barriers to entry

No DBG example

Issue #10: Links between individual rules and overall cumulative impact

Example 19

Clearly define the treatment of all kinds of regulated financial service providers for the purpose of CRR and / or FiCOD consolidated supervision. They should be clearly distinguished form “ancillary service undertakings” (Article 4 (1) No. 18 CRR) and “Financial Institutions” (Article 4 (1) No. 26 CRR) or be explicitly included in those definitions (like asset management companies). Based on the totally different risk profiles we **clearly propose to exclude operators of recognised markets, CCPs and Trade Repositories from the consolidated supervision**. Contrary we see some proximity of CSDs with investment firms or even credit institutions and therefore could agree to include those explicitly under consolidation requirements.

Issue #11: Definitions

Example 20

Definitions of all Financial Market directives or regulations including level 2 texts: The various legislative texts **use inhomogeneous terminology**, the definitions of terminology is **spread all over various legislative texts** and **includes reference chains as well as contradicting terminology**. This is true for very basic definitions. **We recommend combining all necessary definitions in a single rule book on definitions as an EU regulation which is then referred to by the various dossiers**. This keeps maintenance of definitions across dossiers **more simple and avoids usage of undefined terms**, terms with varying content, etc. In case a deviation is intended on purpose, this needs to be clearly stated in the legislative text targeting to do so.

Example 21

Provide a consistent definition of the term ”market maker”, and set up unique qualification criteria within the Union. The term “**market maker**” is **not defined consistently** in MiFID II itself; nor when taking the Short Selling Regulation into account. Providing a **consistent definition would avoid misunderstandings and ambiguities**. In addition, we observe that in some jurisdictions it is **easier to obtain a market maker status than in others**. To our knowledge, in **some jurisdictions** the status of a **”local trading firm” exists**, which **does not require a formal investment firm license**, yet it allows to perform some types of market making. This practice seems handled **inconsistently within the EU**.

Example 22

A **harmonised approach** towards dedicated topics is missing **throughout various legislative texts but even within the same legislative text** (e.g. **definition of “costs”** for the purpose of calculating capital charges, the term **“group”** is used in various regulations and directives, but is not defined in-depth). **We kindly ask for a harmonisation in the definitions to increase comparability.**

Issue #12: Overlaps, duplications and inconsistencies

Example 23

Please, rethink the proposal of the **financial transaction tax**. The **original FTT proposal of the EU Commission makes derivatives transactions subject to taxation**, **even if used for risk management purposes**. Both a **significant rise in hedging costs** and a **decline in the provision of hedging services** will most likely be the **consequence**. This obviously stands in sharp contrast to the EMIR which recognises the **beneficial role of derivatives in the corporate risk management**.

Example 24

Inconsistencies arise as a consequence of exceptions and cross links which are not precise and as such leave open their intended consequences:

a. **Status as "investment firm" of operators of regulated markets operating also a MTF or OTF.** Currently we see conflicts if CSD-R, MiFID / MiFIR and CRR are applicable at the same time, e.g. Articles 71 and 73 CSD-R or Article 2 (1) lit. o MiFID II in conjunction with Article 73 CSD-R.
b. **Status as "investment firm" of CSDs offering MiFID II services.** Like for operators of regulated markets who operate in addition a MTF or OTF also the classification as investment firm is unclear.
c. **"CRR investment firm" status for CSDs and operators of regulated markets offering MiFID II services as described under section a. and b. above**

Clarify in MiFID II that operators of regulated markets which use the option of Article 5 (2) MiFID II are no investment firms. **Clarify in MiFID II** that CSDs offering MiFID II services are no investment firms. **Clarify in Article 73 CSD-R** the consequences for CSDs offering MiFID II services and clarify more precisely the difference of the consequences of Article 73 CSD-R first versus second paragraph. By excluding both operators of regulated markets using the option under **Article 5 (2) MiFID II** and CSDs from the definition of "investment firm" in MiFID the definition of "investment firm" in Article 4 (1) No. 2 lit c .CRR is not fulfilled and an unintended application of CRR and CRD IV can be excluded. This does not exempt CSDs offering banking type of ancillary service from the need to be authorised under CRD IV / CRR and as such being classified as a credit institution under CRR.

Issue #13: Gaps

Example 25

In the aftermath of the crisis 2008 the **interconnectedness and intransparency** of the **OTC derivatives market** was identified as a main cause of the crisis. EMIR (**in particular the clearing obligation)** was introduced as a **primary countermeasure to stabilize** the **OTC derivatives market** and the financial system as a whole. As already recognized in the EMIR

Review consultation responses submitted to the EU Commission, EMIR is perceived as a well-functioning and profound regulation. As a last step of implementing the regulation we **very much welcome that the clearing obligation for interest rate swaps** will most likely become effective June 2016. Nonetheless three important issues were identified where **further specification and explanation appears necessary**:

- Short notice suspension of the clearing obligation
- Current ESMA Q&A process
- Procedure for granting and refusing authorisation through CCP-colleges

Example 26

Go-alone national laws: Some countries have introduced go-alone approaches in the regulation of financial services (e.g., short-selling, financial transaction taxes, algorithmic trading). Behind the **background of an integrated EU financial market**, these **approaches are introducing frictions** and **create opportunities for regulatory arbitrage** for investment firms and trading venues.

Example 27

Equivalence for input data from third country regulated trading venues: The integrity of benchmarks is critical to the pricing of financial instruments and important for risk management issues. EU Commission rightly addresses the topic of benchmarks as the alleged manipulation of LIBOR, EURIBOR and TIBOR has highlighted both the importance of indices and their vulnerabilities. However, **not all indices or indicators are created and operated in a non-transparent way**, **nor are there usually conflicts of interest involved** as in the cases of the Libor, EURIBOR and TIBOR manipulation. **Indices and benchmarks** like the DAX, DAX Global or Euro STOXX 50 and MSCI World are all based on reliable data from regulated trading venues and as such add to financial stability while ensuring an efficient capital allocation at a European as well as a global level. The liquidity and availability of those benchmarks is of great advantage and importance for all market participants.
In this context we would like to point out that the current version of the *'Regulation on indices used as benchmarks in financial instruments and financial contracts'* is **creating an un-level playing field between EU and Non-EU benchmark administrators** as well as unnecessary additional burdens on EU administrators which should be **corrected via the Level 2 process** in 2016 accordingly.

Issue #14: Risk

Example 28

Please do continue to **promote financial stability** and **do not underestimate the risks of interoperability**. In recent years, regulators and policymakers have **clearly understood** and implemented the **vital role of central counterparties** in **strengthening the safety and integrity**

of financial markets, specifically through systemic risk mitigation. The global regulatory efforts are proof of this acknowledgement. CCPs reduce systemic risk and increase risk management. Firstly, CCPs prevent excessive risk taking by being independent risk managers. Secondly, the position of a CCP at the centre of the market reduces interconnectedness of market participants and thirdly, CCPs serve as shock absorbers to protect non-defaulting clearing members, thus avoiding domino effects and uncertainty caused defaults.
Given these clear benefits of CCPs, an **important lesson learnt from the crisis is that CCPs that clear derivatives should not be allowed to become interconnected.** There are fundamental differences in risk management as derivatives have a longer time horizon (settlement of equities transactions takes place 2 days after trading and therefore the counterparty risk is limited), are less standardised and have a different market structure (global, less fragmented, specialised, etc.).

Example 29
The various requirements of CRR / CRD IV – also taking into account the currently discussed and partially agreed amendments by the BCBS – are in different area not reflecting the risk appropriately, dealing with the same risk differently without justification at different areas, are creating higher risks for the financial markets than without these rules.
In particular we have found inconsistencies and weaknesses in the following areas: own funds requirements; large exposures; leverage ratio; boundary between banking book and trading book should be based on trading intention and not product type; process of acquisition etc. Please use the influence of the EU Commission in finalising the revision of the Basel banking framework. Reach comprehensive revised framework and calibrate the requirement in a proportionate manner on an adequate level. Transform revised banking rules into EU law taking into account proportionality, different business models and overall adequate levels of risk limitation. As the EBA has already confirmed our concerns with regard to the rating of collaterals via EBA Q&A 2013_679, we ask the EU Commission to include this content in the Level 1 text, e.g. CRR II. The EU Commission should accept OECD classifications of so called “high income states” (e.g. Germany) as of highest credit quality for collateralisation purposes as for those countries no OECD ratings exist.

Issue #15: Procyclicality

No DBG example

A. Rules affecting the ability of the economy to finance itself and grow

Issue #1: Unnecessary regulatory constraints on financing

The Commission launched a consultation in July on the impact of the Capital Requirements Regulation on bank financing of the economy. In addition to the feedback provided to that consultation, please identify undue obstacles to the ability of the wider financial sector to finance the economy, with a particular focus on SME financing, long-term innovation and infrastructure projects and climate finance. Where possible, please provide quantitative estimates to support your assessment.

1) Example 1:

To which Directive(s) and/or Regulation(s) do you refer in your example? (If applicable, mention also the articles referred to in your example.)

Financial Transaction Tax

Please provide us with an executive/succinct summary of your example:

With intensive international competition between trading venues evolving, plans to introduce taxation of financial transactions in a sub-group of 10 EU Member States willing to cooperate on this issue will seriously harm the level playing field within the European Union as well as in a global perspective.

Furthermore, the design of the **Financial Transaction Tax (FTT) as currently proposed contradicts the policy objectives** derived from the financial crises, as the FTT will stimulate the migration of financial transactions to less regulated and non-transparent markets outside the participating Member States. Hence, issues of systemic stability, transparency and cost contribution of the financial sector will not only remain unsolved, but will merely be detracted from the influence and control of supervisory authorities within the FTT jurisdiction.

Furthermore, the FTT as currently discussed would not be in line with the principle of causation of the financial crises as the **costs of taxation would have to be borne by small and medium enterprises via growing capital-raising costs**. **Savers and private households would also suffer financial losses as the tax would directly hit their retirement provision products**. Policy objectives and regulatory aims aligned to the FTT cannot be achieved considering the institutional design as well as the legal scope of the current proposal.

With regards to MiFID II's Best Execution Rules, these foresee the necessity to outline all costs that an investor faces at a trading venue and to reflect them in their Best Execution Policies. The costs outlined in these Policies would most likely also have to include the FTT. If not all EU countries are involved in such a tax regime, then clearly trading venues located in these countries would be at an advantage, as Best Execution requirement would mandate brokers to route the orders to venues in countries without FTT.

Please provide us with supporting relevant and verifiable empirical evidence for your example: (please give references to concrete examples, reports, literature references, data, etc.)

Regarding the viability of different business models, the Commission's FTT proposal might lead to a non-neutral, disproportional and discriminatory approach. It will lead to disadvantages for companies from participating Member States towards non-participating Member States which can hardly be reversed, once order flow and market participants have been lost to other trading venues outside the FTT jurisdiction. We are concerned, that the introduction of a FTT and the accompanying cost effect might overrule other factors which are decisive for the competitiveness, viability and innovation of business models – such as fast, stable and secure order processing, highly competitive clearing and settlement infrastructures, innovative solutions in pre- and post-trade data provision and additional services. We seriously put into question if introducing new taxation of trading in financial instruments – regardless of politically deemed appropriate or not – should have an economic impact such strong, immediate and inevitable on business decisions.

If you have suggestions to remedy the issue(s) raised in your example, please make them here:

Rethink the proposal of the financial transaction tax.

2) <u>Example 2:</u>

To which Directive(s) and/or Regulation(s) do you refer in your example? (If applicable, mention also the articles referred to in your example.)

Directive 2013/36/EU (CRD IV) and Regulation (EU) No. 575/2013 (CRR)

Please provide us with an executive/succinct summary of your example:

As a consequence of the financial crises, the revised rules on banking supervision of the Basel Committee on Banking Supervision (BCBS) [Basel III] as implemented via CRD IV / CRR have increased capital requirements in the solvency regime, introduced a leverage ratio which is being discussed to become a binding limit in the future and a Liquidity Coverage Ratio (LCR) to have a quantitative limit for short term liquidity management purposes.

The rules are further in discussions and besides detailing the requirements on the leverage ratio and the LCR the next iteration for capital requirements has already started at the level of the BCBS. The more and more increasing capital requirements that are imposed on credit institutions are limiting the ability of credit institutions to grant loans to the economy.

Related to the solvency rules, beside the numerical increase in capital requirements via the introduction of capital buffers the qualitative requirements on capital instruments have been increased accompanied by a stricter composition of capital components. E.g. the minimum portion of CET1 capital has been more than doubled (fully phased-in). In addition, the capturing of the underlying risk elements is modified in a manner that the capital requirement is re-calibrated and (proposed to be) substantially increased.

The three dimensions of strengthened capital rules ((i) increased levels / quantity of capital, (ii) increased quality of capital and (iii) increased consumption of capital) are gearing up each other.

The potential addition of a non-risk sensitive leverage ratio as a binding minimum is further adding to the capital constraints.

Furthermore, the LCR is setting a different framework which needs to be fulfilled at the same time. This will most likely lead to conflicts in fulfilment of the differing rules at the same time. In any case it pushes credit institutions to invest in the stock of high liquid assets instead of granting (short term) loans as cash inflows are capped.

The increased requirements lead to a reduced profitability in combination with a high demand for additional equity. Consequently, there is a fair chance that instead of increasing equity the risk positions have to be reduced and loan facilities will be limited.

Please provide us with supporting relevant and verifiable empirical evidence for your example: (please give references to concrete examples, reports, literature references, data, etc.)

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If you have suggestions to remedy the issue(s) raised in your example, please make them here:

- Calibrate the overall capital requirements under solvency rules in CRR in order to avoid the unintended gearing up of the various elements introduced or currently discussed at the Basel level when considering to implement those. This already should be initiated on the level of the BCBS before coming up with a comprehensive proposal in revising the Basel III rules (already commonly phrased as “Basel IV”).
- Reduce absolute levels of minimum capital requirements. The current minimum capital requirements including (potential) capital buffers as defined by CRR / CRD IV are going even beyond Basel III rules (buffer for systemic risk has been added).
- The capital requirements discussion should not continue to be a race to more and more detailed and demanding requirements covering the addition of all possible worst outcomes but rather focus on a realistic combination of reasonable risk scenarios well calibrated on an appropriate capital level.
- Risk elements which are currently captured – as in the past – only indirectly should not be added to the capital requirements without recalibrating the overall level of capital requirements.

- The leverage ratio should continue to be a reporting instrument only and not be made a binding minimum. In any case a unique (one size fits all) leverage ratio should not be defined in case a binding minimum ratio is considered.
- The combined impact of LCR and solvency rules should be assessed (QIS to be conducted) and EBA should be mandated to better interlink the two regimes.
- The quantitative rules on banking supervision should be simplified going forward in order to avoid over-complexity which bears the risk of errors, misinterpretation and wrong calculation with only a limited chance to detect these errors. While maintaining a sufficient level of risk sensitivity a more simple but stable rule set accompanied by some freedom to the competent authorities to set individual add-ons seems to be better suited to fulfil the aim of the framework.

3) <u>Example 3:</u>

To which Directive(s) and/or Regulation(s) do you refer in your example? (If applicable, mention also the articles referred to in your example.)

Directive 2014/59/EU (BRRD), Article 45 and upcoming RTS (EBA Final Draft RTS EBA/RTS/2015/05)

Please provide us with an executive/succinct summary of your example:

The BRRD has introduced the concept of the minimum requirements on own funds and eligible liabilities (MREL). This is further detailed in related draft RTS (EBA/RTS/2015/05) and implemented via national law.

The purpose of the MREL is to secure adequate (re-)capitalisation of a struggling credit institution and to avoid the usage of tax payers' money when maintaining critical functions of a credit institution eventually coming into resolution.

- The MREL requirements will c.p. add to the capital requirements mentioned with regards to CRD IV / CRR and therefore once more increase the burden in this regards on credit institutions when granting loans. (It is to be noted, that critical financial market infrastructure providers like the companies of our group but potentially also other (specialised) credit institutions may be important to be kept alive in their main parts if not to say c.p. in their entirety).
- The MREL requirement is set based on the risk positions of the credit institutions (and Financial Market Infrastructure providers [FMIs] which operate with a (complementary) banking license). However, its ongoing fulfilment is measured as a pure ratio of the total liabilities and therefore distinct from the captured risk. Therefore, based on the current set up of the MREL details, it is functioning as a **<u>second leverage ratio</u>**.

Please provide us with supporting relevant and verifiable empirical evidence for your example: (please give references to concrete examples, reports, literature references, data, etc.)

The draft EBA RTS concludes a reference level of 10 % of total (relevant) liabilities for the MREL. In addition and under simplified assumptions at least for some institutions (e.g. critical FMIs with a banking license) the capital requirements (for the critical functions, c.p. for the majority of the balance sheet positions) are at least doubled. Taking the currently discussed levels of a possible Level 1 binding leverage ratio of 3 % – 5 % into account, this again would come to around 10 % of total liabilities.

This clearly shows the gearing up of capital requirements which – as long as the capital supply cannot be covered – will potentially lead to a reduction of capital needs via reduced loan offering.

The evidence holds true, even if taking into account that up to 50 % of the MREL can be covered by eligible liabilities (instead of equity). The cost to receive refinancing by such debt will increase and as such reduce the profitability of credit institutions further which will once more reduce the ability to finance them either by equity or debt. In addition, e.g. systemically important FMIs being also credit institutions do not issue debt for funding purposes and as such c.p. cannot use debt instruments for the fulfilment of MREL-requirements without substantially changing their business model.

If you have suggestions to remedy the issue(s) raised in your example, please make them here:

- The MREL is added on top of the components of solvency under CRD IV / CRR which already consider a substantial amount of increased resilience. The introduction of the capital conservation buffer, the countercyclical buffer, the buffer for systemically important banks and the buffer for systemic risk already capture part of the aim the MREL is designed for. Therefore the elements setting the targeted size for the MREL should be reconsidered and the absolute requirements should be scaled to a reasonable amount.
- In addition, the set-up of the MREL first as an absolute amount but second as a percentage of the liabilities is counterproductive and therefore the MREL should be defined as a variable requirement in relation to the underlying risk. Article 45 (1) of BRRD therefore should be rephrased along the following proposed wording (Based on the current text, mark up is shown by strike through and underline):

  1. Member States shall ensure that institutions meet, at all times, a minimum requirement for own funds and eligible liabilities. The minimum requirement shall be calculated <u>based on the underlying risks to be captured and should fluctuated with the underlying risk over time.</u> ~~as the amount of own funds and eligible liabilities expressed as a percentage of the total liabilities and own funds of the institution~~.

Issue #2: Market liquidity

Please specify whether, and to what extent, the regulatory framework has had any major positive or negative impacts on market liquidity. Please elaborate on the relative significance of such impact in comparison with the impact caused by macroeconomic or other underlying factors.

4) <u>Example 1:</u>

To which Directive(s) and/or Regulation(s) do you refer in your example? (If applicable, mention also the articles referred to in your example.)

MiFID II

Please provide us with an executive/succinct summary of your example:

Market-based and regulatory drivers are reducing market liquidity. Dealer risk tolerance has notably declined and bank balance sheets are strained given stricter capital requirements. (See Issue #1 Examples 2 and 3)

The maintenance and development of liquid markets is key in this context. Liquidity providers support the matching of trading interests of buyers and sellers and enable the access of issuers to capital markets. This holds true in particular for markets in financial instruments where liquidity needs to be developed over time and / or trading activity is rather infrequent. Thus, market makers are indispensable for price guidance and the provision of liquidity, thereby ensuring market quality and integrity.

Deutsche Börse Group is concerned that the way MiFID II Level 1 and Level 2 text (regulatory technical standards) for market making are currently drafted will increase costs and risks for market makers and consequently adversely affect liquidity formation in the order book. Liquidity provisioning activities today are in most cases only possible by deploying automated trading technology. MiFID II requires these liquidity providers to enter into written contracts with trading venues. On the other hand, trading venues are required to ensure sufficient liquidity. The rationale for this requirement is understandable: The goal is to have liquidity not only in ordinary market conditions, but also in exceptional market conditions (e.g. high volatility situations). We question whether the goal will be achieved by forcing liquidity providers into a formal market maker role. The end result might be that liquidity providers abstain from voluntary liquidity provision in the first place, thereby not contributing their liquidity at all.

Especially for bond platforms with high volume orders and lower liquidity market maker obligations might have negative impact on markets. Liquidity providers might tend to avoid market maker contracts on different platforms which lead to a concentration of liquidity on just a few trading venues.

Please provide us with supporting relevant and verifiable empirical evidence for your example: (please give references to concrete examples, reports, literature references, data, etc.)

- We see this reflected in diminishing proprietary trading and reduced market making activity of our members, particularly those in the Euro area.
- As a trading venue we are organizing price formation and encouraging liquidity with our product offering, infrastructure, and pricing incentives.
- We also encourage liquidity with measures that are geared towards risk takers' ability to take on risk, trade, and effectively provide liquidity. The ability of market participants to trade and provide liquidity given changing capital requirements is increasingly dependent on the most effective use of risk capital. We facilitate such capital efficiency for example by offering cross-margining capabilities, including between listed and OTC derivatives.

If you have suggestions to remedy the issue(s) raised in your example, please make them here:

Please adjust MiFID II Level 2 regulatory technical standards and CRR, Chapter 2 on own fund requirements for position risk Articles 328.1 and 329 rules for market makers to allow them further doing their business and allocating necessary liquidity for markets – in particular, we consider it essential to avoid any systematic misclassification of trading firms' activities when designing the implementing measures; given that they do not provide loans, do not take savings from retail clients and do their business on their own risks, they should not have the same capital requirements as banks. In the US the topic is resolved more favourable.

5) <u>Example 2:</u>

To which Directive(s) and/or Regulation(s) do you refer in your example? (If applicable, mention also the articles referred to in your example.)

CRD IV / CRR

Please provide us with an executive/succinct summary of your example:

Tightened rules for banking supervision and supervision of FMIs [Regulation (EU) No 648/2012 (EMIR) for CCPs and Regulation (EU) No 909/2014 (CSD-R) for CSDs] (but also Solvency II for insurance companies) have increased the demand for low risk / highly liquid securities with low levels of market- and credit risk (mainly government bonds). Ignoring current abnormal market circumstances (low interest rates, ECB quantitative easing, declining quality of government bonds (rating downgrades) and consequently reduced market volume in good quality bonds, etc.) the demand will grow over time taking the phasing-in arrangements of Basel III / CRD IV / CRR into account. With the upcoming next steps of quantitative capital requirements (see issue #1 examples 2 and 3 above[2]) the demand will continue to grow while

[2] Mainly the expected increase in risk weights for central government debt and the reduced impact of credit risk mitigation (based on the latest proposal of the BCBS), and also the requirements coming from a potential implementation of the leverage ratio as a

the offer due to differentiated classes of quality will continue to decline. This is further impacted by the liquidity requirements of the LCR and NSFR which will kick in over time until 2018 / 2019.

Moreover, a variety of rules (e.g. Article 429b CRR or the BCBS proposal "Haircut floors for non-centrally cleared SFTs"[3] – d340[4]) punish (regulatory) not fully covered collateralised exposures compared to uncollateralised exposures. This contradicts the underlying risk. In order to keep risk low or even reduce risk but avoid regulatory penalties (higher capital or liquidity requirements), credit institutions will undertake measures to avoid situations of (regulatory) under-collateralisation and will require higher haircuts above reasonable levels which will further reduce market liquidity. This may come in addition to shifts in the exposures as such (rather invest into better quality counterparties) or reduction of exposures which will both reduce the general loan business (see issue #1).

Please provide us with supporting relevant and verifiable empirical evidence for your example: (please give references to concrete examples, reports, literature references, data, etc.)

- Article 30 (6) lit. c of the Commission Delegated Regulation EU 2015/61[5] (additional outflows) contains a clause that in cases where collateral qualified as High Quality Liquid Asset (HQLA) was received but could be substituted by collateral which does not qualify as HQLA without the consent of the holder of these collaterals (e.g. in a collateral basket), additional cash outflows must be included. This leads to the strange situation that an uncollateralised placement or a placement with collateral not being eligible as HQLA will in principle (depending on counterparty and maturity) count as cash inflow (i.e. qualifies as "liquidity") whereas a reverse repo with HQLA collateral subject to possible substitution with non-HQLA collateral will count as HQLA (i.e. the collateral will do so) but receive an equal amount as cash outflow without correcting the underlying liquidity again. This leads to a reduction of the liquidity position as the funds – i.e. cash – are totally neutralised. Hence, the liquidity for LCR purposes is unintendedly lost, while the uncollateralised transaction (and therefore a transaction with lower quality from a liquidity perspective) is still considered as an inflow. Therefore, the current treatment of collaterals with regards to additional outflows for HQLA collateral which might be substituted into non-HQLA is harming the appropriate usage of collateralisation mechanism. In order to avoid not-intended impacts, credit institutions are

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binding pillar I limit (currently discussed at a level of rather 5 % than 3 % and also mainly discussed as one ratio for all institutions rather than a more diversified approach taking e.g. business model and size into account) and MREL (or TLAC on international level)

[3] The BCBS is currently proposing to demand minimum haircut floors in SFTs. In case those minimum haircuts are not applied correctly the transaction must be treated as unsecured (in its entirety). It must be expected that credit institutions will demand higher levels of collateralisation to prevent such situation. Therefore available eligible collaterals, which are already rare, will even more diminish with negative implications on market liquidity. Consequently we ask the Commission not to implement such standard in the EU.

[4] http://www.bis.org/bcbs/publ/d340.pdf

[5] (known as LCR Delegated Act)

forced to avoid such tools and will have to go to either HQLA only driven solutions (with negative impacts on market liquidity due to higher demand) or solutions with higher risk but less liquidity "charge" in the context of the LCR.

In the leverage ratio an add-on for counterparty credit risk in SFTs is imposed via Article 429b CRR (included in the CRR via the Leverage Ratio Delegated act). For a credit institution that grants an unsecured loan of e.g. 100 EUR the respective contribution to the exposure measure in the leverage ratio is 100 EUR. If the credit institution places the same amount via a collateralised placement (=loan that is collateralised with securities) in which the collateralisation is lower than 100 EUR (under consideration of potential haircuts), e.g. 90 EUR, the gap between the loan value and the collateralisation (e.g. 10 EUR) is added to the exposure measure of the leverage ratio, keeping in mind that the original loan of 100 EUR is included anyway. Comparing those two loans (uncollateralised loan [100 EUR] vs. collateralised placement [110 EUR]) the credit institution is better off accepting the unsecured loan compared to the under-collateralised SFT of the same original exposure amount. This will increase the level of the haircuts being requested for collateral to cover collateralised loans and consequently reduce liquidity in HQLA.

If you have suggestions to remedy the issue(s) raised in your example, please make them here:

- In order to allow for an adequate liquidity regime and an appropriate quantitative capturing of the liquidity risk, the LCR should be reviewed regularly for its appropriateness.
- As the LCR will be phased-in in the EU until 2018, the definition of HQLA should be monitored over time and adjustments to the definition (especially a more simple definition) should be developed in order to make the liquidity coverage ratio fitting to liquidity management reality and avoid unnecessary negative market liquidity impact while maintaining a sufficient and adequate level of liquidity risk management control.
- Article 30 (6) lit. c of the LCR Delegated Act should be changed in a way, that such collateral is (a) not captured as HQLA (in case it fulfils the relevant criteria) but as inflow and (b) that the inflow cap is not to be applied on such inflows and (c) no additional outflow is to be recognised. The add-on for credit risk in SFT imposed by Article 429b CRR should not be applied in general and in particular not for secured placements.
- Haircut floors on non-centrally cleared SFTs as proposed by the BCBS currently should not be introduced.

Issue #3: Investor and consumer protection

Please specify whether, and to what extent, the regulatory framework has had any major positive or negative impacts on investor and consumer protection and confidence.

6) Example 1:

To which Directive(s) and/or Regulation(s) do you refer in your example? (If applicable, mention also the articles referred to in your example.)

MiFID II (Art.25 (6))

Please provide us with an executive/succinct summary of your example:

Under the revised MiFID II / MiFIR framework tightened investor protection rules were introduced, regarding for example the investment advice of banks and other financial institutions: With the objective of improving the information of retail investors the documentation duties of banks have been increased. Banks across Europe will have to document their investment advice in future, although experience shows that overwhelming documentation duties already have negative side effects.

As a consequence, many banks abandoned its investment advice in shares significantly or completely and retreat from investment advice in other securities like bonds and investment funds. This development will further harm the equity culture among retail investors, which is already underdeveloped in the EU compared to other jurisdictions like the US. Additionally, the documentation requirement appears to be too time-consuming. These are the reasons why the EU Commission should provide experienced retail clients (e.g. those customers receiving an investment advice five times in the last two years) the option to waive the obligation that the suitability of the investment advice has to be recorded ("suitability report" Art.25 (6) MiFID II).

Transparency and a sufficient level of information are crucial for investor protection. However, they should take into account potential negative side effects. Future efforts to reform the European framework for investor protection thus should focus on a widespread economic literacy as core element enabling investors to make sound investment decisions in their own responsibility.

Please provide us with supporting relevant and verifiable empirical evidence for your example: (please give references to concrete examples, reports, literature references, data, etc.)

A study of Deutsche Aktieninstitut provided evidence that a significant number of banks have already withdrawn from investment advisory services. Due to strict regulatory requirements 22 % of credit institutions ceased to provide any advice in shares; 65% reduced its talks – by and large significantly – with customers regarding shares (DAI, "As a result of regulation banks refrain more and more from providing investment advice in shares - a survey", July 2014).

Investors do not get adequate advice from their banks, simply because advisory services have become too costly and complicated.

If you have suggestions to remedy the issue(s) raised in your example, please make them here:

Promote education in order to achieve an economy based on knowledge and innovation, including measures to improve financial and economic literacy. Only well-defined investor protection rules are crucial for a changing landscape.

Provide experienced clients the option to waive documentation requirements about investment advice.

7) <u>Example 2:</u>

To which Directive(s) and/or Regulation(s) do you refer in your example? (If applicable, mention also the articles referred to in your example.)

Financial Transaction Tax (FTT)

Please provide us with an executive/succinct summary of your example:

The introduction of an FTT would significantly and negatively affect private households and the real economy alike. It will not stabilize capital markets and will not generate the expected revenue but will rather hinder growth and increase risks for investors.

Please provide us with supporting relevant and verifiable empirical evidence for your example: (please give references to concrete examples, reports, literature references, data, etc.)

- The tax burden will be shifted to the end users of capital markets and non-financial companies. For private households almost all forms of private old-age provision and wealth accumulation are negatively affected by the FTT. This applies to direct investment in equities and bonds as well as to direct investment funds and capital funded life insurances. In Germany alone, this results in a total annual burden for private households of €2.6 to €3.6 billion based on the original proposal of the EU Commission. Adding the tax burden for the corporate finance and risk management activities of the real economy, end users in Germany would be exposed to FTT-related costs of approximately €5.0 to €7.3 billion annually (DAI/Oliver Wyman, “Die Finanztransaktionssteuer – ein politischer Irrweg?”, 2013).
- The FTT is neither capable of stabilizing capital markets nor of mitigating fluctuant prices of financial instruments. To the contrary, empiric studies show that rather the opposite applies as the tax will reduce market liquidity and thereby increase the volatility of prices of financial instruments. Experiences gained in Italy and France show a relative decline of trading volumes by 34.2% resp. 6.4% after the FTT was introduced (Buchanan/Baudewyn/Ling, “Financial Transaction Taxes Loom Large”, Credit Suisse Market

Commentary from 16 April 2014). Consequently, risks will rather be increased than reduced.

- Mobile and flexible market participants will most likely relocate financial transactions to countries not taking part in the enhanced cooperation, so that private households and non-financial companies which are rather immobile will bear the majority of costs. Additionally, the costs of implantation and enforcement will drive the overall economic balance further into the negative besides the fact that revenues will be far lesser than expected (being shown by national FTTs in France and Italy).

If you have suggestions to remedy the issue(s) raised in your example, please make them here:

Rethink the proposal of introducing a financial transaction tax

8) <u>Example 3:</u>

To which Directive(s) and/or Regulation(s) do you refer in your example? (If applicable, mention also the articles referred to in your example.)

Directive 97/9/EC and MiFID II

Please provide us with an executive/succinct summary of your example:

Directive 97/9/EC introduced rules for investor-compensation schemes to cover losses investors may face when using investment firms under Directive 93/22/EEC. The rules were also made in order to protect investors in case an investment firm was passporting its services under Directive 93/22/EEC. MiFID I (Directive 2004/39/EC, replacing Directive 93/22/EEC) added the operating of a Multilateral Trading Facility (MTF) as an additional investment services and made providers of a MTF investment firms. However, for MTFs dedicated rules on "passporting" have been introduced in Article 31 (5) and (6) MiFID I which clearly show that "passporting" is a different topic in case of operating a MTF. Furthermore, MiFID I did not reflect the introduction of the new service in respect to the investor-protection scheme.

With MiFID II, the category of OTFs have been added to the investment firms and again, no change on the investor-protection scheme has been envisaged (i.e. no explicit consideration on OTF and / or MTF has been made in this regards) and for "passporting" the same rules as for MTFs apply.

Operators of regulated markets are not regarded as investment firms and this in our view holds true in case they operate a MTF or an OTF[6]. As such, they have been prior to MiFID II not in scope of the investor-protection scheme. MiFID I clearly stated this also in Article 5 (2). (With

[6] However due to the current wording of MiFID II it is unclear if operators of regulated markets that operate a MTF or an OTF are different from our view to be regarded as investment firm. This needs to be clarified and in case classification as an investment firm is not intended but only the appropriate treatment under MiFID respective links to regulatory consequences for investment firm need to be avoided. For example the applicability of Art.15 MiFID II. For further detail Issue 12 example 3 or Issue 10 example 1.

the non-application of the relevant Article 11 [in general Articles 11 – 15 were not applicable in case an operator of a regulated market was operating in addition a MTF).

MiFID II has withdrawn the non-applicability of former Article 11 (now Article 14, in fact the whole exclusion sequence has been taken out) in Article 5 (2) – to our best knowledge without the intention to apply those articles but only to simplify the legal text.

As a matter of fact, we feel that the inclusion of operators of MTFs or OTFs be them investment firms or market operators with the only investment services performed being the operation of MTFs or OTFs or both does not fulfil the aim of directive 97/9/EC and as such is going beyond the needs for investor protection.

Please provide us with supporting relevant and verifiable empirical evidence for your example: (please give references to concrete examples, reports, literature references, data, etc.)

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If you have suggestions to remedy the issue(s) raised in your example, please make them here:

- Adjust directive 97/9/EC in order to exclude operators that only operate as MTF and / or OTF from the scope of the investment protection scheme (it may be wise to update that Directive anyway in order reflect changes in EU law of the last 20 years);
- Adjust Article 14 MiFID II in order to reflect the above proposed exclusion;
- Re-introduce the eliminated exclusion in Article 5 (2) MiFID II with the revised content as under MiFID I again, at least exclude the applicability of Articles 14 (investor protection scheme) and 15 (minimum capital requirements as defined in CRR) MiFID II which would cover the whole company and not only the provision of investment services.

Issue #4: Proportionality / preserving diversity in the EU financial sector

Are EU rules adequately suited to the diversity of financial institutions in the EU? Are these rules adapted to the emergence of new business models and the participation of non-financial actors in the market place? Is further adaptation needed and justified from a risk perspective? If so, which, and how?

9) <u>Example 1:</u>

To which Directive(s) and/or Regulation(s) do you refer in your example? (If applicable, mention also the articles referred to in your example.)

CRR / CRD IV

Please provide us with an executive/succinct summary of your example:

CRD IV / CRR, the related Level 2 texts and further guidelines and EBA recommendations are aimed to deliver more and more a single rule book within the EU for supervising the banking industry. We clearly support the aim of harmonising the framework and also making supervisory practices similar across the EU. As such, also the introduction of the SSM and the related subsequent regulations and guidelines add to this approach. However, overall the rule-set for banks has reached a complexity which makes it very difficult to comply in all aspects. In addition, in the attempt to harmonise the rule-set also the necessary flexibility to react on different business models and different sizes individually has been replaced by some level of system inherent flexibility for that purpose. Overall this leads to a very complex and inflexible approach towards proportionality and capturing dedicated business models.

CRR is the basis for prudential rules for some of the investment firms as defined in MiFID. However, low risk investment firms are excluded from the applicability of the CRR rules. In our view, the investment service of operating a MTF or an OTF (or even both) is a subset of the investment activity "Reception and transmission of orders in relation to one or more financial instruments" (Directive 2014/65/EU, Annex I Section A No. 1) with additional limitations and requirements. As such, both investment services should not be treated more stringent under CRR as the above mentioned investment services. As operators of MTFs or OTFs by nature of their business do not hold clients' money or clients' securities as long as they do not hold permission for additional businesses, the current treatment seems not to be proportionate. The most recent EBA report on investment firms (EBA/Op/2015/20) issued on 14 December 2015 highlights more differences with regards to the treatment of investment firms in general and the inadequacy of proportionality in this regards. While we do not share some of the comments of EBA in detail and would also not subscribe to all parts of the EBA recommendations, the report clearly supports our argumentation on the need to adjust CRD IV / CRR with regard to investment firms. Unfortunately (a) the EBA report falls short on properly dealing with MTFs / OTFs (the report mainly only argues that they are not taken up in CRD IV and an appropriate treatment is missing to cover its dedicated risk) and (b) is asking to impose more (but better harmonised and tailored) rules on investment firms and as such in a variety of elements in our view is asking for the introduction of rules which are not adequate for the inherent risk but go far beyond a reasonable approach and are not proportionate to the risk and the business model.

Please provide us with supporting relevant and verifiable empirical evidence for your example: (please give references to concrete examples, reports, literature references, data, etc.)

Due to the current wording of Article 4 (1) No. 2 lit c. CRR operators of MTFs and OTFs are regarded as an investment firm under CRR. This leads to the fact they have to fulfil solvency requirements under Article 95 CRR, disclosure requirements under part VIII CRR and their initial capital requirement is not in scope of Article 31 CRD IV. Consequently, operators of MTFs or OTFs without additional licenses or only offering investment services which are covered by Article 4 (1) No. 2 lit. c CRR have to fulfil more stringent requirements than those MiFID-investment firms exempted from the CRR investment firm definition of Article 4 (1) No. 2 lit c CRR (see also the EBA report (EBA/Op/2015/20) for further evidence).

If you have suggestions to remedy the issue(s) raised in your example, please make them here:

- The rule-set for credit institutions (and some investment firms) in CRR and the subsequent Level 2 texts should be reconsidered in order to reduce complexity. Despite continuing to harmonise the rule base and to reduce the number of options and national discretions, a more flexible approach towards smaller or specialist institutions should be allowed for competent authorities. Granting a bonus or malus in certain areas based on a clear assessment and a generic rule of proportionality seems to us more favourable than incorporating lots of granular rules to allow some level of proportionality on a rule by rule basis while in general following a "one size fits all" strategy.
- Article 4 (1) No. 2 lit. c CRR should be enhanced to also exclude MTFs and OTFs (investment services according to Directive 2014/65/EU Annex I section A No. 8 and 9) from the definition of "investment firm" according to CRR. This would harmonise the requirements for the initial capital and the non-applicability of CRR rules for operators of MTFs or OTFs with other investment firms of a similar (or even slightly higher) risk profile.
- Do not introduce quantitative liquidity requirements, a minimum leverage ratio (or even a reporting obligation for a leverage ratio) or a quantitative rule-set for large exposures / concentration risks for investment firms that do not hold clients' assets (neither cash nor securities) and are not entering in proprietary trading. The requirement of an adequate risk management framework that also covers appropriate but proportional guidelines for concentration risks should be sufficient.

10) Example 2:

To which Directive(s) and/or Regulation(s) do you refer in your example? (If applicable, mention also the articles referred to in your example.)

Regulation (EU) No. 909/2014 (CSD-R), SSM Regulation

Please provide us with an executive/succinct summary of your example:

According to Article 54 in conjunction with the Annex part C CSD-R CSDs are allowed to perform ancillary banking services if certain conditions are fulfilled. Similarly, dedicated credit institutions are allowed to perform banking services for CSDs. However, in both cases the banking activities are strictly limited and strong additional requirements for risk management, liquidity management, credit business and collateral usage are imposed by CSD-R and the related level 2 texts. As such, the allowed banking business is by far more restricted and limited than that of ordinary credit institutions. CSD-R imposes the application of the "strictest" rules (see recital 48 CSD-R) which in principle are to be read as the rules for G-SIBs under CRR. Albeit we agree to the systemic importance and systemic risk such CSDs have for the well-functioning of the financial markets, we cannot agree to impose **strictest** banking standards to a limited banking business. For CSDs it is the operational risk which drives the overall risk situation and not the credit risk as this is heavily limited and maturity transformation or market risk is not possible in a material size. Operational risk however is not fundamentally different between CSDs offering ancillary banking services and those not doing so. However, for CSDs (like for CCPs) on top of operational risk also business risk and the cost associated with a potential need for winding-down or restructuring are covered in the capital requirements under CSD-R in combination with the (draft) EBA technical standard. The full application of liquidity requirements under CRR is not reflecting the liquidity structure and the investment limitations of a CSD and should not be applied. This is in particular true for the LCR and the NSFR if not tailored for the specific business. Also the leverage ratio – in case deemed necessary to introduce as a pillar I limit – should not be applied to CSDs – at least not without dedicated adjustments. Moreover, the application of G-SIB buffers does not seem appropriate in case the CSD is not qualified per se and under the standard rules as a G-SIB. Finally, the direct supervision of significant banks by the ECB under the SSM is targeting to supervise "real" banks. The limited banking function of a CSD or a CSD service bank (according to Article 54 (4) CSD-R) in our view is not the scope of the classification as a significant bank under the SSM and therefore the CSD-R should not call for a direct ECB supervision under the SSM (see recital 51 CSD-R). Contrary, a classification as a "significant institution" under the SSM should be explicitly excluded. In case an ECB supervision is deemed to be useful (which we doubt so far), a dedicated ECB supervision should be introduced by the CSD-R itself.

In addition, the current wording of Article 54 CSD-R in our view does not allow any CSD to offer banking type of ancillary services to another CSD.

The current limitation will not make it attractive to offer banking type of ancillary services for CSDs. While this may be done on intention to avoid CSDs / CSD service banks offering business deemed to be risky, this is also leading to some restrictions in day to day operating of CSD activities. Settlement in non-domestic currency for example will become extremely difficult if the CSD does not offer banking type of ancillary services itself.

Please provide us with supporting relevant and verifiable empirical evidence for your example: (please give references to concrete examples, reports, literature references, data, etc.)

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If you have suggestions to remedy the issue(s) raised in your example, please make them here:

- Consider to adopt CSD-R in order to reduce overarching requirements on CSDs offering banking type of ancillary services as the limitations of the banking services are not taken into account in an adequate manner.

- Consider allowing CSDs to offer banking type of ancillary services to other CSDs.
- Consider to adopt CRR / CRD IV via CSD-R for CSDs or CSD service banks that fall in scope of CRR / CRD IV in order to reflect the real business risk; exclude the application of LCR / NSFR and leverage ratio or calibrate/adopt these ratios to reflect the business of CSDs
- Exclude supervision of CSDs / CSD service banks by the ECB as significant institutions under the SSM as the SSM has a different focus.
- Apply CRR / CRD IV rules only to CSDs (and taking into account necessary modifications), in case they would apply anyway and not just because it is a CSD offering banking type of ancillary services.

11) <u>Example 3:</u>

To which Directive(s) and/or Regulation(s) do you refer in your example? (If applicable, mention also the articles referred to in your example.)

BRRD

Please provide us with an executive/succinct summary of your example:

The Banking Recovery and Resolution Directive (BRRD) is applicable to all credit institutions in the European Union. The respective rule-set is therefore applicable to CSDs and CCPs also operating with a banking license. This is the case for CSDs offering banking type of ancillary services as allowed under CSD-R or CCPs offering banking services e.g. in order to broaden the possibilities for their liquidity management.

The resolution (winding down) of CCPs is already (partially) covered by EMIR and the respective level 2 rule texts via a default waterfall including a default fund and a socialisation mechanism. For both CCPs under EMIR and CSDs under CSD-R including the relevant level 2 texts, guidelines for recovery and resolution are existing to some extent for their core business and the capital requirements cover a dedicated amount to capture the risk of winding-down or restructuring. As the BRRD covers the whole company and its entire businesses, the BRRD regime would currently cover those FMIs that are also licensed as credit institutions. However, this is neither appropriate nor proportionate as those requirements are not tailored for the above described FMIs.

Explicitly the bail-in rules and the MREL requirements of BRRD do not fit for FMIs also operating with a banking license. The standard business relations do not lead to bail-in able liabilities and this is for good reasons. For CCPs the current default waterfall already captures a lot of the requirements and the current dedicated discussions for a recovery and resolution regime for CCPs should be used to close any existing gap. For CSDs offering banking type of ancillary services, it is mainly the credit function which triggers tighter rules. In case deposits placed with such CSDs would be made subject to potential bail-in, settlement efficiency would decline substantially and / or CSD participants would rather use pre-financing by the CSD and subsequent funding. This would lead to (a) unintended credit exposures (although in general collateralised) and (b) funding needs for the CSD which creates unintended funding activities that – based on the bail-in ability of such funding – may also be difficult to reach.

Therefore, recovery and resolution regimes for FMIs should be tailored for the main regulated activity and double regulation should be avoided. The EU Commission has already recognised the need for dedicated treatment in some areas of BRRD and the related level 2 texts. For example the Commission Delegated Regulation (EU) 2015/63 explicitly exempts in Article 5 (1) lit. c and lit. d liabilities related to the FMI business from calculation basis as rule-set is not fitting which is reasoned in recital 11 of that regulation.

Please provide us with supporting relevant and verifiable empirical evidence for your example: (please give references to concrete examples, reports, literature references, data, etc.)

- The MREL requirements for FMIs in general will have to be fulfilled by equity in order to avoid taking up business which is not the core activity of such FMIs. Moreover, as the business of (systemically important) FMIs will be to a large extent to be kept in a resolution situation, the CRR capital requirements are in general doubled which in our mind does not reflect the real risk situation.
- The level 1 approach on the ongoing MREL requirements (a percentage of the liabilities) is not sensitive to the risk which is supposed to be covered. (See above issue #1). However, as FMIs liabilities are substantially fluctuating depending on their participants' behaviour this has a bigger impact on FMIs falling in scope of BRRD than on other credit institutions. EBA level 2 text has acknowledged that problem and softened it to some extent by a more frequent fixing of the given percentage. However, this is only reducing but not solving the problem.

If you have suggestions to remedy the issue(s) raised in your example, please make them here:

- FMIs being in addition to their function as CCP or CSD also credit institution with a (limit) authorisation also under CRR should only fall to a limited degree in scope of BRRD and specific provisions in CSD-R, EMIR or a dedicated FMIs Recovery and Resolution legislation should prevail over the provisions of BRRD (no double regulation, no strictest of approach). The BRRD therefore should take this into account and – where necessary – clearly exempt FMIs form the applicability of certain provisions.

B. Unnecessary regulatory burdens

Issue #5: Excessive compliance costs and complexity

In response to some of the practices seen in the run-up to the crisis, EU rules have necessarily become more prescriptive. This will help to ensure that firms are held to account, but it can also increase costs and complexity, and weaken a sense of individual responsibility. Please identify and justify such burdens that, in your view, do not meet the objectives set out above efficiently and effectively. Please provide quantitative estimates to support your assessment and distinguish between direct and indirect impacts, and between one-off and recurring costs. Please identify areas where they could be simplified, to achieve more efficiently the intended regulatory objective.

12) Example 1:

To which Directive(s) and/or Regulation(s) do you refer in your example? (If applicable, mention also the articles referred to in your example.)

MiFIR (Art 3, 6, 35, 36, 37), EMIR (e.g. Art 7, 51, 77) and CSDR (e.g. Art 38, 49, 51, 53)

Please provide us with an executive/succinct summary of your example:

The above mentioned regulations include diverse rules that shall enable competition between FMIs. Among others prices shall be granted at reasonable commercial terms and access to and interoperability between infrastructures shall be granted. In the respective recitals the reference to the competition law is made.

These kinds of regulations have two short comings: They follow a functional approach and therefore only address the FMI providing certain rules but not other market participant (investment firm, data vendor, custodian or even third country FMIs). Moreover, these rules ignore that we have a functioning European competition law in place. Many of these rules add additional cost to the services provisions by FMIs and are not in line with global standards.

Please provide us with supporting relevant and verifiable empirical evidence for your example: (please give references to concrete examples, reports, literature references, data, etc.)

-

If you have suggestions to remedy the issue(s) raised in your example, please make them here:

Please ensure level playing field with regard to other market participants.

13) Example 2:

To which Directive(s) and/or Regulation(s) do you refer in your example? (If applicable, mention also the articles referred to in your example.)

CRD IV / CRR

Please provide us with an executive/succinct summary of your example:

CRD IV, CRR and the related level 2 texts (plus national implementation and EBA guidelines, etc.) have increased the rule set for credit institutions dramatically. The level of detail of the rules and the need to have a very granular data base in order to fulfil regulatory requirements is more than burdensome. Further steps are on its way starting at the FSB / BCBS level. The proposed change (of BCBS) on the boundary between trading book and non-trading book is just an example to show the growing demand on revised treatments.

Please provide us with supporting relevant and verifiable empirical evidence for your example: (please give references to concrete examples, reports, literature references, data, etc.)

-

If you have suggestions to remedy the issue(s) raised in your example, please make them here:

Simplify the banking framework (see issue #1)

Issue #6: Reporting and disclosure obligations

The EU has put in place a range of rules designed to increase transparency and provide more information to regulators, investors and the public in general. The information contained in these requirements is necessary to improve oversight and confidence and will ultimately improve the functioning of markets. In some areas, however, the same or similar information may be required to be reported more than once, or requirements may result in information reported in a way which is not useful to provide effective oversight or added value for investors.

Please identify the reporting provisions, either publicly or to supervisory authorities, which in your view either do not meet sufficiently the objectives above or where streamlining/clarifying the obligations would improve quality, effectiveness and coherence. If applicable, please provide specific proposals.

Specifically for investors and competent authorities, please provide an assessment whether the current reporting and disclosure obligations are fit for the purpose of public oversight and ensuring transparency. If applicable, please provide specific examples of missing reporting or disclosure obligations or existing obligations without clear added value.

14) Example 1:

To which Directive(s) and/or Regulation(s) do you refer in your example? (If applicable, mention also the articles referred to in your example.)

For the debate on the introduction of a possible consolidated tape (CTP)

Please provide us with an executive/succinct summary of your example:

While strongly promoting transparency, DBG questions the sense of debate on a Consolidated Tape (CTP). The European market infrastructure is different from the US market.
Today exchanges already provide these data in a high quality and data vendors consolidate them where sensible. Professional users will not use CTP data and retail investors also have all data they need already today. MiFID II even includes a review clause on the effectiveness of the foreseen CTP regime until middle of 2019.

Instead a central audit tape might be better suited to enable competent authorities to fulfil their supervisory tasks. The main difference to the CTP would be that it would include more data (including the beneficial owner) and would only be available to the supervisors.

Please provide us with supporting relevant and verifiable empirical evidence for your example: (please give references to concrete examples, reports, literature references, data, etc.)

We understand that there seems to be some confusion amongst market participants, mixing both consolidation of real-time data for the public on the one side and consolidation of reporting data for the regulator on the other side, something which seems to have happened throughout the debate of MiFID II already. We agree that a different focus of data consolidation for regulators on a t+1 basis might be a sensible issue as it currently seems very difficult for ESMA to consolidate t+1 transaction reporting data (EMIR as well as MiFID II) for the purpose of market surveillance and/or information extraction.

In any case it is important to clearly differentiate between consolidation of real-time data and consolidation of t+1 data within the consolidation debate as the data sets for real-time publication and those for t+1 reporting to the NCAs differ significantly, especially as regards applicable data protection law.

Regulation of Consolidated Tape already covered by MiFID II: MiFID II, including the regulation of consolidated tapes, will be transposed at the beginning of 2018 with a review of the resulting effects already in 2020. In case no consolidated data / consolidated tape – in the form as required by legislation now – will be made available, MiFID II already foresees a public procurement process for the appointment of a commercial operating entity. Additionally, as of today, MiFID II foresees as well that pre- and post-trade data is being made available at reasonable commercial terms.

In this context it is worthwhile to point out the following open issues which should be considered by EU COM in the overall context of a Consolidated Tape, regardless if regulated in MiFID II or any other follow-up regulation:

- **A Consolidated Tape will not be able to support the creation of a harmonized market as long as national law and taxation is not being further harmonized across the EU.** Fragmentation in the EU is different from the fragmentation in the US, and in fact more intense due to national differences and market structures. While the US markets have multiple competing trading venues as well, like in the EU, they do not have to cope with different legal and tax rules across fragmented markets at the same time. Neither is language a barrier to such an extent as experienced in the EU. It is those differences across national markets which need to be harmonized first, before a simple Consolidated Tape consolidating data of instruments with different cost and risk would be effective and sensible.

- **Cross-border transactions within the EU are more expensive than national transactions, costs which can be significant and which are not being reflected within a Consolidated Tape.** Therefore, a Consolidated Tape would not even be supportive of best execution requirements like those applied in the EU which include as well all transaction costs. It is worthwhile to note that while IFs offer retail customers trade execution cross-border, those executions are being charged at significantly higher fees compared to national executions. Furthermore, cost factors – which form a significant part of the best execution requirement in the EU – are not displayed on a Consolidated Tape which then is of little value for the best execution in the EU. At the same time especially retail investors experience a significant uncertainty as regards different applicable law within different local markets within the EU (see our point in the previous bullet above).

- **A one to one comparison with the US is neither sensible nor constructive.** This is due to many reasons in fact. First, the Consolidated Tapes A and B in the US per definitionem are not providing a full display of all trades executed in the US. Smaller trades e.g. (trades for less than 100 shares of stock) are not included in the Tapes. Research shows that median number of missing trades can be 20-60% of total transactions depending on share. Second, the tapes are an important part of RegNMS (operating in a fully harmonized market without any language, law and/or taxation barriers) at different best execution requirements, including trade through requirements in a technically connected market place across venues, with a secure funding of the Tapes through mandatory data subscription by any trading party. Especially the latter allow for a quasi -subsidized funding of the Tapes, compared to the EU where there is no mandatory use required by law. On top the eligible customer base in the US is four times larger than in the EU. An under theorized comparison between both markets, as well as regards pricing of data, therefore, is more than questionable and should be avoided by all means.

- **Consolidated Tapes in the EU are already available as of today.** As of today, Market Data Vendors already offer consolidated data across EU equity markets. Besides some larger well-known market data vendors, offering both feed and display consolidated data, smaller niche players too offer their services to the market. While the offerings might not be fully harmonized, both industry initiatives like the MMT Group as well as regulation via MiFID II should provide for the desired effect. However, the CTP requirements within MiFID II seem rather strict for the provision of a service which de facto is already provided as of today by many service providers.

- **There are no clear use cases provided by the EU COM for which purpose the real-time Consolidated Tape should be created**. Form follows function. The respective use cases for a tape finally define what needs to be included and at which point in time. The Tapes in the US are an integral part with a clear function within RegNMS and a different best execution regime, which is not targeted at a fragmented market with the fragmentation reaching as far as legal and taxation differences (see our arguments above). At the same time even the US does cope with problems of its own in the context of CT, both based on advancements in technology and old systems being used, as well as a US market structure which might be prone to recently experienced "Flash Crashes" through the inherent network effect of RegNMS.

Consolidated Audit Trail for t+1 reported data as a sensible tool for regulators: While the issue of "real-time Consolidated Tapes for public information" are being taken care of already by MiFID II (as described above) ESMA and the NCAs seem to be in a position where they receive and will continue to receive vast amounts of t+1 data (e.g. position reporting data, transaction reporting data, including vast amounts of non-publicly available personal data) which currently it seems regulators cannot use in an efficient and sensible way. Please note in this context that we talk about different as well as broader sets of data with a significant time difference as regards the provision of the data compared to the Consolidated Tapes as referred to above. Data made available to the regulator contains many sensible data like personal data which cannot and should not be shared with the public.

EMIR and going forward as well MiFID II will result in many data which need to be consolidated for the regulators in order for them to extract required information efficiently, be it for market abuse detection or be it for detection of potentially pending systemic risks. In this context it is worthwhile pointing out that in the US regulators are currently working on a Consolidated Audit Trail. The system shall be available for regulators and contain personalized (non-public) data delivered t+1 into a Central Data base covering all market participants as well as asset classes. Please note that this Consolidated Audit Trail (CAT) in the US will be coexisting besides the Consolidated real-time Tapes in the US as well due to the different nature of the data and the different underlying transparency requirements. While the CAT is aiming high on the consolidation of significant amounts of data a price tag of USD 500 million for the set-up and maintenance over the first 5 years has been given as an initial indication.

It is worthwhile mentioning as well that ESMA has just launched "centralized data projects" for MiFID II and EMIR. To our knowledge those projects shall result in a central database for regulators, for the first time allowing common access and information sharing as well as information extraction. In this context it will be necessary, however, to consider both data protection rights of reporting parties as well as potential IP rights as regards the collected reference data which finally will be published as well on the ESMA website.

If you have suggestions to remedy the issue(s) raised in your example, please make them here:

In case the EU considers a Consolidated Audit Trail (for t+1 data including all sensitive data required by regulators) as a potential and reasonable option for the EU build up an efficient supervisory structure, any potential inclusion into future regulation should at least ensure the following:

- that ESMA – who is already working on t+1 consolidation – would still consider a Consolidated Audit Trail (CAT) a necessary tool, and if that is the case.
- that a detailed and fact-based study will be conducted upfront including all relevant data sources from the beginning in order to avoid any misinterpretations.
- that a global level playing field is being assured.

Any one-to-one comparison with the US, which is not fully based on fact-based research, should be avoided by all means.

15) Example 2:

To which Directive(s) and/or Regulation(s) do you refer in your example? (If applicable, mention also the articles referred to in your example.)

MiFIR (Art 4 and 5)

Please provide us with an executive/succinct summary of your example:

In general, we support the approach to increase the levels of pre-trade transparency in equity trading. Especially the discontinuation of Broker Crossing Networks (respective OTF) and the trading obligation in the field of equity markets will significantly improve transparency in this area.

MiFIR introduces a Waiver Cap Regime for equities. Although we agree to the attempt to stop the current trend towards more 'dark trading' in Europe, we think this could have been achieved much simpler.

Please provide us with supporting relevant and verifiable empirical evidence for your example: (please give references to concrete examples, reports, literature references, data, etc.)

The Waiver Cap regime was introduced in order to revert an increasing trend of 'dark trading' in Europe. It is hard to understand why smallest order sizes are to be exempt from the general pre-trade-transparency requirement. Thus we applaud the MIFIR approach to curb dark trading.

However, the current model of the "Double Waiver Caps" is burdened with a high operational complexity and requires large amounts of data – on a per financial instrument basis --, and corresponding maintenance and coordination of the involved trading venues. The efforts are overly complex and burdensome, whereas the goal of preserving a high level of pre-trade transparency could have been achieved in a much easier way.

If you have suggestions to remedy the issue(s) raised in your example, please make them here:

We support the idea of curbing dark trading in equities. However, due to the operational complexities involved, we suggest replacing the current "Double Waiver Cap Regime" for the Reference Price Waiver and the Negotiated Trade Waiver with a far simpler model. The model we propose envisages that only orders of a minimum size, but smaller than Large-in-Scale (e.g., 80% of Large-in-Scale) can be subject to these two waivers.

16) <u>Example 3:</u>

To which Directive(s) and/or Regulation(s) do you refer in your example? (If applicable, mention also the articles referred to in your example.)

CRD IV / CRR

Please provide us with an executive/succinct summary of your example:

The pillar III report as required based on part VIII of CRR in combination with the remuneration disclosures and the disclosures based on articles 88 - 96 CRD IV has (similar to the IFRS notes) reached substantial volumes and considerable content and is likely to increase with full Basel III implementation. In addition, several level 2 texts require exhaustive information in a very granular level. We also consider that this is creating more dis-information than clarity.

Please provide us with supporting relevant and verifiable empirical evidence for your example: (please give references to concrete examples, reports, literature references, data, etc.)

-

If you have suggestions to remedy the issue(s) raised in your example, please make them here:

Reduce/limit complexity, extent and granularity required in the pillar III disclosure requirements.

Issue #7: Contractual documentation

Standardised documentation is often necessary to ensure that market participants are subject to the same set of rules throughout the EU in order to facilitate the cross-border provision of services and ensure free movement of capital. When rules change, clients and counterparties are often faced with new contractual documentation. This may add costs and might not always provide greater customer/ investor protection. Please identify specific situations where contractual or regulatory documents need to be updated with unnecessary frequency or are required to contain information that does not adequately meet the objectives above. Please indicate where digitalisation and digital standards could help to simplify and make contractual documentation less costly, and, if applicable, identify any obstacles to this happening.

17) ***Example 2:***

To which Directive(s) and/or Regulation(s) do you refer in your example? (If applicable, mention also the articles referred to in your example.)

MiFID II/ MiFIR (investment advice, Article 25 (6) MiFID II)

Please provide us with an executive/succinct summary of your example:

Under the revised MiFID II/ MiFIR framework tightened investor protection rules were introduced, regarding for example the investment advice of banks and other financial institutions: With the objective of improving the information of retail investors the documentation duties of banks have been increased. Banks across Europe will have to document their investment advice in future, although experience shows that overwhelming documentation duties already have negative side effects. Banks are struggling with the costs of compliance. As a consequence, banks frequently retreat from providing investment advice especially on shares. This results in a severe damage for the private wealth building with shares. Additionally, financing SMEs by issuance of shares purchased by retail investors will become more difficult as banks are increasingly reluctant to provide information regarding share investments.

Please provide us with supporting relevant and verifiable empirical evidence for your example: (please give references to concrete examples, reports, literature references, data, etc.)

A study of Deutsche Aktieninstitut provided evidence that a significant number of banks have already withdrawn from investment advisory services. Due to strict regulatory requirements 22 per cent of credit institutions ceased to provide any advice in shares; 65 per cent reduced its talks - by and large significantly - with customers regarding shares (DAI, “As a result of regulation banks refrain more and more from providing investment advice in shares - a survey”, July 2014). Investors do not get adequate advice from their banks, simply because advisory services have become too costly and complicated.

If you have suggestions to remedy the issue(s) raised in your example, please make them here:

Therefore, rules governing investment advice of investment firms should be adjusted. An example: Experienced retail investors should have the option to waive the obligation that the suitability of the investment advice has to be recorded (“suitability report” Art. 25(6) MiFID II). For the benefit of effective investor protection an environment providing for widespread financial and economic literacy should be promoted instead of pursuing an ecosystem with even more regulatory requirements for issuers.

Issue #8: Rules outdated due to technological change

Please specify where the effectiveness of rules could be enhanced to respond to increasingly online-based services and the development of financial technology solutions for the financial services sector.

18) <u>Example 1:</u>

To which Directive(s) and/or Regulation(s) do you refer in your example? (If applicable, mention also the articles referred to in your example.)

EMIR

Please provide us with an executive/succinct summary of your example:

There is a need to improve wording for portfolio margining as further detailed in the answer below.

Please provide us with supporting relevant and verifiable empirical evidence for your example: (please give references to concrete examples, reports, literature references, data, etc.)

EMIR Article 27 on Portfolio Margining contains requirements around correlations between individual products and in particular terms like reliability of correlations are not well-defined from a mathematical point of view. Hence, EMIR Article 27 is not model neutral. We suggest amending this Article to make it model neutral but still ensure prudent, high minimum standards. Tests of model performance are crucial and already described in the RTS for EMIR. We also suggest that for the economic rationale, consistency with the default management process should be required, as only those offsets should be allowed which can be sustained in the default management process.

If you have suggestions to remedy the issue(s) raised in your example, please make them here:

Wording proposal for EMIR Article 27:

1. A CCP may allow offsets or reductions in the required margin across the financial instruments that it clears if the price risk of one financial instrument or a set of financial instruments is significantly and reliably related with the price risk of other financial

instruments. This can be demonstrated on the basis of a statistical parameter of dependence between the prices or by showing that margin reductions granted by portfolio margining can be sustained in the liquidation process.

2. The CCP shall document its approach on portfolio margining. The CCP shall demonstrate the existence of the economic rationale under which the group of financial instruments can be portfolio margined by demonstrating consistency with the liquidation process. In addition it shall either:
   a. demonstrate that the statistical parameter of dependence between two or more financial instruments cleared is reliable over the lookback period calculated in accordance with Article 25, or
   b. demonstrate that the portfolio margining model is sufficiently robust by means of sound back- and stress-testing in accordance with Chapter XII;
3. All financial instruments to which portfolio margining is applied shall be covered by the same default fund and the same default management process. By way of derogation, if a CCP can demonstrate in advance to its competent authority and to its clearing members how potential losses would be allocated among different default funds and has set out the necessary provisions in its rules, portfolio margining may be applied to financial instruments covered by different default funds.
4. Where portfolio margining covers multiple asset classes (as agreed between the CCP and the participants involved in the default management), the amount of margin reductions between asset classes shall be no greater than 80 % of the difference between the sum of the margins for each asset class calculated on an individual basis and the margin calculated based on a combined estimation of the exposure for the combined portfolio. Where the CCP is not exposed to any potential risk from the margin reduction, it may apply a reduction of up to 100 % of that difference.

   Paragraph 5 is integrated into paragraph 2.

Issue #9: Barriers to entry

Please document barriers to market entry arising from regulation that the EU should help address. Have the new rules given rise to any new barriers to entry for new market players to challenge incumbents or address hitherto unmet customer needs?

No DBG example

C.Interactions of individual rules, inconsistencies and gaps

Issue #10: Links between individual rules and overall cumulative impact

Given the interconnections within the financial sector, it is important to understand whether the rules on banking, insurance, asset management and other areas are interacting as intended. Please identify and explain why interactions may give rise to unintended consequences that should be taken into account in the review process. Please provide an assessment of their cumulative impact. Please consider whether changes in the sectoral rules have affected the relevancy or effectiveness of the cross-sectoral rules (for example with regard to financial conglomerates). Please explain in what way and provide concrete examples.

19) Example 1:

To which Directive(s) and/or Regulation(s) do you refer in your example? (If applicable, mention also the articles referred to in your example.)

CRD IV / CRR, FiCOD, CSD-R / EMIR, MiFID II

Please provide us with an executive/succinct summary of your example:

EU financial services legislation has put a multitude of dedicated rule sets for various individual financial services providers. The rule set for each of those is tailor made and requires a prudential framework which captures the specifics of these service providers to the extent deemed necessary. Although we do not agree to all the provisions put in place, overall it is common sense that a dedicated business should have dedicated business rules.

Beside financial service / financial sector specific rules, also rules for consolidated supervision have been put in place which consists mainly of the rule set of CRD IV / CRR and FiCOD and also to some extent of Solvency II. We do not comment on Solvency II in detail. The prudential framework for operators of regulated markets, CSDs as well as CCPs and Trade Repositories (to name the most prominent financial services providers in question) are defined in MiFID (including MIFID II), CSD-R and EMIR respectively. However, there are no clear provisions on the treatment of such financial service providers under consolidated supervision neither in the Articles 18 and 19 CRR nor in FiCOD. CSDs may fall in scope of the definition of “financial institution” as defined in Article 4 (1) No. 26 CRR. Additionally the treatment of undertakings with a clear defined supervisory framework in the EU for the purpose of other Financial Market rule-sets is often unclear, undefined or not specific. It cannot be judged if that has been done by chance of on purpose. E.g. the definition of “financial sector entity” in Article 4 (1) No 27 CRR list a variety of financial service providers but does not include e.g. CCPs, CSDs, operators of regulated markets, Trade Repositories etc.

Furthermore, it is unclear if – under certain conditions – CSDs or operators of regulated markets are to be defined as Investment firms under MiFID II or even under CRR (Article 4 (1) No. 2 lit. c CRR) [see issue #3 example 4 below]

Consequently, a clear treatment of a variety of clearly defined financial services providers for consolidated supervision is missing and different interpretations are possible which should be avoided.

In addition, double regulations of the same treatment should be avoided. E.g. asset management companies are either regarded as a “Financial Institution” under CRR and are subject to consolidated supervision based on Article 18 (1) CRR or are to be consolidated as per Article 18 (8) CRR.

Please provide us with supporting relevant and verifiable empirical evidence for your example: (please give references to concrete examples, reports, literature references, data, etc.)

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If you have suggestions to remedy the issue(s) raised in your example, please make them here:

Clearly define the treatment of all kinds of regulated financial service providers for the purpose of CRR and / or FiCOD consolidated supervision. They should be clearly distinguished form “ancillary service undertakings” (Article 4 (1) No. 18 CRR) and “Financial Institutions” (Article 4 (1) No. 26 CRR or be explicitly included in those definitions (like asset management companies).

Another issue in this regard is the definition of “Financial sector entity” in Article 4 (1) No 27 CRR. In this definition not all regulated providers of financial services are listed, e.g. CCPs, CSD, Trade Repositories, etc. are missing. We ask to analyse why several regulated providers of financial services are not included. Those financial undertakings should be commonly defined in different dossiers. Any intended deviation should be clearly addressed in the legislative text as such.

Based on the totally different risk profiles we clearly propose to exclude operators of regulated markets, CCPs and Trade Repositories from the consolidated supervision. Contrary we see the some proximity of CSDs with investment firms or even credit institutions and therefore could agree to include those explicitly under consolidation requirements. However, as stated in our responses to issues #1 example 3 above we see the need for specific treatment of some business activities of CSDs under any banking rule (e.g. CRD IV / CRR, BRRD, DGSD, etc.) also in the context of any kind of consolidated supervision.

Issue #11: Definitions

Different pieces of financial services legislation contain similar definitions, but the definitions sometimes vary (for example, the definition of SMEs). Please indicate specific areas of financial services legislation where further clarification and/or consistency of definitions would be beneficial.

20) Example 1:

To which Directive(s) and/or Regulation(s) do you refer in your example? (If applicable, mention also the articles referred to in your example.)

Definitions of all Financial Market directives or regulations including level 2 texts

Please provide us with an executive/succinct summary of your example:

The various legislative texts use inhomogeneous terminology, the definitions of terminology is spread all over various legislative texts and includes reference chains as well as contradicting terminology. This is true for very basic definitions:

- Some terms are used with the intention of same content but with differing definitions, sometimes with only slightly different wording (mainly due to history and not reflecting actual developments) and consequently potential differing outcome, e.g. “financial sector entity” in CRR (article 4 (1) No. 27 and “financial undertaking” in Solvency II (Article 13 (25)) or “close link” in Solvency II (Article 13 (17)) and in MiFID II (Article 4 (35)). Another example is “subsidiary” defined in MiFID II (Article 4 (33)), AIFMD (Article 4 (1) lit ak) and CRD IV (Article 4 (13))).
- Sometimes cross links do not match (e.g. Solvency II refers in Article 13 (25) lit. c) for the definition of investment firm AND financial institution to MiFID II Article 4 (1) (1) which only defines investment firms).
- Sometimes terms are defined in a similar manner but with slight variations on purpose (e.g. “parent undertaking” which is defined i.a. in Solvency II (Article 13 (15)), MiFID II (Article 4 (32)) and CRD IV (Article 4 (14)); “branch” which is defined i.a. in Solvency II (Article 13 (11)) and CRD IV (Article 4 (16))).
- Sometimes different wording is used but same content is meant (e.g. “supervisory authority” in Solvency II (Article 13 (10)) but “competent authority” in CRD IV (Article 4 (36)), EMIR (Article 2 (13)) as well as MiFID II (Article 4 (26)) or “qualifying holding” defined in Solvency II (Article 13 (21)), AIFMD (Article 4 (1) lit. ah), MiFID II (Article 4 (31)) and CRD IV (Article 4 (33)) or “Asset Management Company” in FiCoD Article 2 (5) and “UCITS management company” in MiFID II Article 4 (28)).
- Sometimes same terms are used but with completely different meaning (e.g. “leverage” which is defined i.a. in CRR (Article 4 (93)) and AIFMD (Article 4 (1) v) or “operational risk” defined in CRR (Article 4 (52)) as well as in Solvency II (Article 13 (33))).
- Multiple definitions are made by cross-referencing to other dossiers.

- Sometimes terms are used with unclear and no explicit reference to other dossiers where it is nevertheless targeted to (e.g. EMIR Article 16 in combination with the related technical standard requires to cover credit risk as well as counterparty credit risk. However, in CRD IV, where the capital requirements are taken from, the risk that a counterparty to a transaction defaults before the final settlement of the transaction's cash flows for positions outside the trading book is already included in the credit risk.).
- Sometimes translations of same terms in various dossiers are not the same (e.g. German terminology for "Central Counterparty": SFD Article 2 lit a) "Zentrale Verrechnungsstelle", EMIR Article 1 (1) "zentrale Gegenpartei", CRD Article 78 (4) "zentrale Gegenpartei").
- Sometimes definitions are duplicated within the same set of regulations (e.g.: CRD IV defines "ancillary services undertaking" in Article 3 (1) No 17 while in General referring to the definitions of Article 4 CRR which already defines the "ancillary service undertaking" in its Article 4 (18)).

Please provide us with supporting relevant and verifiable empirical evidence for your example: (please give references to concrete examples, reports, literature references, data, etc.)

-

If you have suggestions to remedy the issue(s) raised in your example, please make them here:

We recommend combining all necessary definitions in a single rule book on definitions as an EU regulation which is then referred to by the various dossiers. This keeps maintenance of definitions across dossiers more simple and avoids usage of undefined terms, with varying content etc. In case on purpose a deviation is intended, this needs to be clearly stated in the legislative text targeting to do so.

21) <u>Example 2:</u>

To which Directive(s) and/or Regulation(s) do you refer in your example? (If applicable, mention also the Articles referred to in your example.)

MiFID II (Art 4.1 (7), Art 17(3), Short Selling Regulation)

Please provide us with an executive/succinct summary of your example:

The term "Market Maker" is not defined consistently in MiFID II itself; nor when taking the Short Selling Regulation into account. Providing a consistent definition would avoid misunderstandings and ambiguities.

In addition, we observe that in some jurisdictions it is easier to obtain a market maker status than in others. To our knowledge, in some jurisdictions the status of a 'local trading firm' exists, which does not require a formal investment firm license, yet it allows to performing some types of market making. This practice seems inconsistently handled within the EU.

Please provide us with supporting relevant and verifiable empirical evidence for your example: (please give references to concrete examples, reports, literature references, data, etc.)

-

If you have suggestions to remedy the issue(s) raised in your example, please make them here:

Provide a consistent definition of the term 'market maker', and set up unique qualification criteria within the Union.

22) <u>Example 3:</u>

To which Directive(s) and/or Regulation(s) do you refer in your example? (If applicable, mention also the Articles referred to in your example.)

CRD IV, CRR, CSD-R, MiFID II, MiFIR, EMIR and related level 2 texts

Please provide us with an executive/succinct summary of your example:
A harmonised approach towards dedicated topics is missing throughout various legislative texts but even within the same legislative text.

a. Definition of "Costs" for the purpose of calculating capital charges

The definition of "costs" is in relevant e.g.:

1. For the calculation of minimum capital requirements of investment firms as an alternative method. (Article 97 CRR in conjunction with Commission Delegated Regulation (EU) 2015/488 amending Delegated Regulation (EU) No 241/2014)
2. For the minimum capital requirements of CCPs (Article 2 delegated act EU (No) 152/2013)
3. For the minimum capital requirements of CSDs (EBA Final draft Regulatory Standards EBA/RTS/2015/10 Article 6 (3))

Related to this the existence of a profit and loss transfer agreement should not lead to the effect that a capital instrument does not qualify as CET1 (EBA Q&A 2013_408). This agreement is only targeting future profits, but does not have an impact on the actual capital base which remains the same. As such, the existence of a profit and loss transfer agreement in our view does not conflict with the aim of the capital definition of CRR and therefore should not be in conflict with the requirements of Article 97 CRR.
In addition we disagree with the interpretation of the EBA[7] to consider the profit transfer under

[7] See page 20 of https://www.eba.europa.eu/documents/10180/561374/EBA-RTS-2014-01+%28Own+Funds+-+Fixed+Overheads%29.pdf

a profit transfer agreement as fixed overheads with the consequence of additional capital requirements. Those profit transfers cannot be regarded as fixed costs as they depend on the actual profit (this argument is also valid for income taxes).

b. “Group”

The term “group” is used in various regulations and directives, but it is not defined always. As an example, it is used in Article 91 CRD IV but it is not defined in CRD IV or CRR. Contrary, EMIR is defining the term “group” in Article 2 (16). This definition defines a “group” as both either a statutory group with reference to the accounting directive (Article 1 and Article 2 of directive 83/349/EEC) or a regulatory group with reference to CRD I (Article 3 (1) and Article 80 (7) and (8) CRD I). Moreover, MiFID II defines a group under reference to the accounting directive (Article 2(11) of Directive 2013/34/EU) only (MIFID II Article 4 (34)).

Please provide us with supporting relevant and verifiable empirical evidence for your example: (please give references to concrete examples, reports, literature references, data, etc.)

-

If you have suggestions to remedy the issue(s) raised in your example, please make them here:

We kindly ask for a harmonisation in the definition of “costs” as a basis for any capital requirement calculation as follows “***annual gross operational expenses shall consist of the elements 8 to 14 of Article 27 of Council directive 86/635/EC***” to increase comparability. In case this Directive is not directly applicable the expenses of the undertaking in question shall map its’ expenses in an appropriate manner to the definitions of that Directive.

We strongly ask to include capital instruments linked to a profit and loss pooling agreement as eligible equity and also not to include any payment for profit distribution as “cost” as a basis for capital requirements.

We strongly support to use for the term “group” the accounting definition only (Article 2(11) of Directive 2013/34/EU) and as such follow the MiFID II approach. This at least should be used consistent for the limitation of mandates according to Article 88/91 CRD IV, Article 9 (1) and Article 45 (2) MiFID II. Any deviation from the definition of “group” under accounting term (i.e. undertakings under consolidated supervision which may differ from the “group” under accounting terms) should be clearly addressed and defined and potentially should receive a clear terminology.

Issue #12: Overlaps, duplications and inconsistencies

Please indicate specific areas of financial services legislation where there are overlapping, duplicative or inconsistent requirements.

23) <u>Example 1:</u>

To which Directive(s) and/or Regulation(s) do you refer in your example? (If applicable, mention also the Articles referred to in your example.)

Financial transaction tax

Please provide us with an executive/succinct summary of your example:

The original FTT proposal of the EU Commission makes derivatives transactions subject to taxation, even if used for risk management purposes. Both a significant rise in hedging costs and a decline in the provision of hedging services will most likely be the consequence. This obviously stands in sharp contrast to the EMIR which recognises the beneficial role of derivatives in the corporate risk management.

Please provide us with supporting relevant and verifiable empirical evidence for your example: (please give references to concrete examples, reports, literature references, data, etc.)

-

If you have suggestions to remedy the issue(s) raised in your example, please make them here:

Rethink the proposal of the financial transaction tax.

24) <u>Example 2:</u>

To which Directive(s) and/or Regulation(s) do you refer in your example? (If applicable, mention also the Articles referred to in your example.)

MiFID II, CSD-R, CRD IV / CRR

Please provide us with an executive/succinct summary of your example:

a. **Status as "investment firm" of operators of regulated markets operating also a MTF or an OTF**

According to Article 1 MiFID II the Directive is applicable to investment firms and operators of regulated markets. This wording suggests that operators of regulated markets are no investment firms. Further Article 4 (1) MiFID II defines that everybody who inter alia operates an MTF or an OTF is regarded as an investment firm.

Article 5 (2) MiFID II is exempting operators of regulated markets **<u>from the requirements to receive an admission</u>** in accordance with Article 5 (1) MiFID II, but does neither foresee an exemption from the definition as investment firm nor legal requirements derived from that status.

Consequently, i.a. Article 14 MiFID II must be fulfilled by such an operator of a regulated market “at the moment of admission”, although no admission as investment firm is necessary. Taking for granted, that the requirements at the time of admission need to be kept also any time during the operation of the admitted services, the application of Article 14 and other MiFID II rules for investment firms on operators of regulated markets in their entirety (i.e. on the basis of the legal entity) does not make sense (see our argumentation to issue#3 example 3).

b. Status as “investment firm” of CSDs offering MiFID II services

CSDs are according to Article 73 CSDR in conjunction with Article 2 (1) lit. o MiFID II as modified by CSDR not obliged to apply for an authorisation under MiFID II in order to offer MiFID II services. However, the scope of the exemption from MiFID II / MiFIR rules based on Article 73 first and second paragraph CSDR respectively in conjunction with Article 2 (1)) lit. o MiFID II as modified by CSDR is more than unclear. Like for operators of regulated markets who operate in addition a MTF or OTF also the classification as investment firm is unclear.

c. “CRR investment firm” status for CSDs and operators of regulated markets offering MiFID II services as described under section a. and b. above

Based on the above described situation, it is unclear whether or not such service providers will also be an investment firm as defined under Article 4 (1) No. 2 lit c. CRR. If so, at least minimum capital requirements under Articles 95 CRR will apply. Furthermore, CSDs which do not offer banking type of ancillary services may fall in scope of CRR just due to the fact that MiFID services as allowed under CSD-R are performed. This in our view is not intended.

Please provide us with supporting relevant and verifiable empirical evidence for your example: (please give references to concrete examples, reports, literature references, data, etc.)

-

If you have suggestions to remedy the issue(s) raised in your example, please make them here:

- Clarify in MiFID II that operators of regulated markets which use the option of Article 5 (2) MiFID II are no investment firms.
- Clarify in MiFID II that CSDs offering MiFID II services are no investment firms.
- Clarify in Article 73 CSD-R the consequences for CSDs offering MiFID II services and clarify more precisely the difference of the consequences of Article 73 CSD-R first versus second paragraph.
- By excluding both operators of regulated markets using the option under Article 5 (2) MiFID II and CSDs from the definition of “investment firm” in MiFID the definition of investment firm in Article 4 (1) No. 2 lit. c CRR is not fulfilled and an unintended

application of CRR and CRD IV can be excluded. This does not exempt CSDs offering banking type of ancillary service from the need to be authorised under CRD IV / CRR and as such being classified as a credit institution under CRR and potentially CSDs being classified as financial institutions acc. CRR and the respective consequences of that status.

Issue #13: Gaps

While the recently adopted financial legislation has addressed the most pressing issues identified following the financial crisis, it is also important to consider whether they are any significant regulatory gaps. Please indicate to what extent the existing rules have met their objectives and identify any remaining gaps that should be addressed.

25) Example 1:

To which Directive(s) and/or Regulation(s) do you refer in your example? (If applicable, mention also the Articles referred to in your example.)

EMIR

Please provide us with an executive/succinct summary of your example:

In the aftermath of the crisis 2008 the interconnectedness and intransparency of the OTC derivatives market was identified as a main cause of the crisis.

EMIR (in particular the clearing obligation) was introduced as a primary countermeasure to stabilize the OTC derivatives market and the financial system as a whole. As already recognized in the EMIR Review consultation responses submitted to the EU Commission, EMIR is perceived as a well-functioning and profound regulation. As a last step of implementing the regulation we very much welcome that the clearing obligation for interest rate swaps will most likely become effective June 2016.

Nonetheless three important issues were identified where further specification and explanation appears necessary:

- Short notice suspension of the clearing obligation
- Current ESMA Q&A process
- Procedure for granting and refusing authorisation through CCP-colleges

Please provide us with supporting relevant and verifiable empirical evidence for your example: (please give references to concrete examples, reports, literature references, data, etc.)

Short notice suspension of the clearing obligation:

In the EMIR Review consultation responses, voices were raised to install the possibility of a **short notice suspension of the clearing obligation** given a certain severity of market disruptions.

Not only does this appear counterproductive considering why the clearing obligation was implemented in the first place as it would reintroduce interconnectedness and intransparency in the infected market segment. The reaction of market participants and the impact of such a sudden change of the market cannot be presumed.

Current ESMA Q&A process:

The Questions and Answers (Q&A) on the implementation of EMIR published by ESMA serve as guidance when interpreting EMIR as well as the associated Regulatory Standards. However, we are of the opinion that the process reaching from the initial question to the provided answer through the Q&A could be improved.

Procedure for granting and refusing authorisation through CCP-colleges

We believe that the current EMIR provisions for colleges are well designed and need no change. The given structure with national competent authorities in charge of CCP supervision, coordinating among the national authorities in the college works out well. However, with respect to the process for the introduction of new products and services as well as improvements in risk management models the existing EMIR requirements need to be streamlined.

Articles 15 EMIR (Extension of activities and services), 17 EMIR (Procedure for granting and refusing authorisation) and 19 EMIR (Opinion of the College) stipulate a clear framework and timeline for extending activities and services not covered by the CCPs authorization. In contrast, the provisions under Article 49 EMIR (Review of models, stress testing and back testing) deal with changes made to risk management services of CCPs but do not provide such guidance in terms of a framework and timeline. In addition, Article 49 EMIR provides wording that might stipulate a duplication of efforts since it addresses the national competent authority (NCA) as well as ESMA. It would be beneficial if Article 49 EMIR is amended to consistently correspond with the process outlined in Articles 15, 17 and 19 EMIR. In the context of Article 49 EMIR DBG supports the proven structure with the NCA not only responsible for the supervision of the CCP but also being in charge for evaluating the severity of planned changes.

The College shall remain responsible for the consistent application of the EMIR rules.

If you have suggestions to remedy the issue(s) raised in your example, please make them here:

Short notice suspension of the clearing obligation:

Do not reduce the effectiveness of the intended measure of the clearing obligation by allowing the possibility of suspensions from the clearing obligation.

Current ESMA Q&A process:

The current process of developing and deciding on the answers should be amended to include an impact assessment and a prior industry consultation. This process should also include the publication of the questions under review.

Procedure for granting and refusing authorisation through CCP-colleges

Based on experience with the introduction of new product and services since authorization we would like to highlight the following points in order to improve the process:

- It would be beneficial to publish a list with indicative criteria used for the evaluation of applications for new products and services under Articles 15 and 17 EMIR and/or to determine whether a change is deemed ‘significant’ according to Article 49 EMIR. Also, the factors considered by regulators when determining any material changes (Article 49 EMIR) should be disclosed.
- A maximum timeframe for the responsible authorities to evaluate and decide on changes deemed ‘significant’ covered under Article 49 EMIR should be introduced. The timeline should be consistent with Article 15, 17 and 19 EMIR. In addition to the defined responsibility as outlined above this will add certainty for CCPs.

26) <u>Example 2:</u>

To which Directive(s) and/or Regulation(s) do you refer in your example? (If applicable, mention also the Articles referred to in your example.)

Go-alone national laws

Please provide us with an executive/succinct summary of your example:

Some countries have introduced go-alone approaches in the regulation of financial services (e.g., short-selling, financial transaction taxes, algorithmic trading). Behind the background of an integrated EU financial market, these approaches are introducing frictions and create opportunities for regulatory arbitrage for investment firms and trading venues.

Please provide us with supporting relevant and verifiable empirical evidence for your example: (please give references to concrete examples, reports, literature references, data, etc.)

German HFT Law (2013) and German Short Selling Law (2010): Trading firms avoiding German trading venues; doing the same business at non-German trading venues to avoid the new requirements; whereas the latter being left at a competitive disadvantage.

French and Italian FTTs

If you have suggestions to remedy the issue(s) raised in your example, please make them here:

Member states to refrain from go-alone approaches in the future.

27) ***<u>Example 3:</u>***

To which Directive(s) and/or Regulation(s) do you refer in your example? (If applicable, mention also the Articles referred to in your example.)

Regulation on indices used as benchmarks in financial instruments and financial contracts

Please provide us with an executive/succinct summary of your example:

The integrity of benchmarks is critical to the pricing of financial instruments and important for risk management issues. EU Commission rightly addresses the topic of benchmarks as the alleged manipulation of LIBOR, EURIBOR and TIBOR has highlighted both the importance of indices and their vulnerabilities. However, not all indices or indicators are created and operated in a non-transparent way, nor are there usually conflicts of interest involved as in the cases of the Libor, EURIBOR and TIBOR manipulation. Indices and benchmarks like the DAX, DAX Global or Euro STOXX 50 and MSCI World are all based on reliable data from regulated trading venues and as such add to financial stability while ensuring an efficient capital allocation at a European as well as a global level. The liquidity and availability of those benchmarks is of great advantage and importance for all market participants.

In this context we would like to point out that the current version of the *'Regulation on indices used as benchmarks in financial instruments and financial contracts'* is creating an un-level playing field between EU and Non-EU benchmark administrators as well as unnecessary additional burdens on EU administrators which should be corrected via the Level 2 process in 2016 accordingly.

Please provide us with supporting relevant and verifiable empirical evidence for your example: (please give references to concrete examples, reports, literature references, data, etc.)

In general the current version of the regulation rightly allows for proportionality depending on the respective risk of a benchmark. In this context it acknowledges the high quality and reliability of input data provided by regulated trading venues as being a significant asset when creating reliable and trustworthy benchmarks, and therefore provides for several alleviations for the index provider of such benchmarks.

However, in its current form it only considers EU trading venues as defined per (24) of Article 4(1) of Directive 2014/65/EU as providers of regulated input data excluding those input data generated by regulated trading venues outside of the EU. This differentiation is overly strict as input data from third country regulated trading venues in general provides for the same assets in terms of quality (transaction based or firm bid offer data generated under the rules and surveillance of a regulated market) and public availability of the data. EU benchmark administrators as well as Non-EU administrators, as of today, use data form third country trading venues in order to provide global investable benchmarks to investors across the globe including those in the EU. This ensures that EU investors are having sufficient choice of benchmarks and exposure to global markets in an efficient and cost effective way.

However, while third country benchmark administrators may use third country regulated trading venues data under less strict regulatory requirements, while offering those benchmarks as well within the EU, EU located benchmark administrators will have to comply with additional requirements when using input data from third country regulated trading venues. Thus the EU benchmark administrator of the DAX Global would be stricter regulated compared to the benchmark administrator of the MSCI World, while using a rather similar set of input data. This is creating an un-level playing field to the detriment of the EU located entities. In light of the better regulation framework and the jobs and growth agenda such unequal treatment should be avoided.

If you have suggestions to remedy the issue(s) raised in your example, please make them here:

Therefore, and in order to avoid over-regulation, data from third country regulated trading venues should generally qualify as regulated data benchmarks, provided that such regulated trading venues are subject to regulatory standards which are similar to MiFID (potentially to be evidenced by cooperation agreements between local supervisors and EU authorities). Otherwise, if only non-EU administrators would benefit from certain alleviations in this respect, there would be an unequal treatment between EU and non-EU administrators, to the disadvantage of the EU administrators which would go against what has been intended in the Level 1 political process.

D. Rules giving rise to possible other unintended consequences

Issue #14: Risk

EU rules have been put in place to reduce risk in the financial system and to discourage excessive risk-taking, without unduly dampening sustainable growth. However, this may have led to risk being shifted elsewhere within the financial system to avoid regulation or indeed the rules unintentionally may have led to less resilient financial institutions. Please indicate whether, how and why in your view such unintended consequences have emerged.

28) Example 1:

To which Directive(s) and/or Regulation(s) do you refer in your example? (If applicable, mention also the Articles referred to in your example.)

MiFIR, EMIR Review

Please provide us with an executive/succinct summary of your example:

Please do continue to promote financial stability and do not underestimate the risks of interoperability.

In recent years, regulators and policymakers have clearly understood and implemented the vital role of central counterparties in strengthening the safety and integrity of financial markets, specifically through systemic risk mitigation. The global regulatory efforts are proof of this acknowledgement.

CCPs reduce systemic risk and increase risk management. Firstly, CCPs prevent excessive risk taking by being independent risk managers. Secondly, the position of a CCP at the centre of the market reduces interconnectedness of market participants and thirdly, CCPs serve as shock absorbers to protect non-defaulting clearing members, thus avoiding domino effects and uncertainty caused by counterparty defaults.

Given these clear benefits of CCPs, an important lesson learnt from the crisis is that CCPs that clear derivatives should not be allowed to be come interconnected. Should this happen, it would increase risk and endanger the functioning of CCPs, which would counter the positive effects of market infrastructure on financial stability.

Please provide us with supporting relevant and verifiable empirical evidence for your example: (please give references to concrete examples, reports, literature references, data, etc.)

-

If you have suggestions to remedy the issue(s) raised in your example, please make them here:

Please do continue to promote financial stability and do not underestimate the risks of interoperability.

29) Example 2

To which Directive(s) and/or Regulation(s) do you refer in your example? (If applicable, mention also the Articles referred to in your example.)

CRD IV / CRR

Please provide us with an executive/succinct summary of your example:

The various requirements of CRR / CRD IV – also taking into account the currently discussed and partially agreed amendments by the BCBS – are in different area not reflecting the risk appropriately, dealing with the same risk differently without justification at different areas, are creating higher risks for the financial markets than without these rules and…
In particular we have found inconsistencies and weaknesses in the following areas:

I. Own funds requirements

a. Revision of the capital framework by the BCBS

The BCBS is currently reviewing and updating the capital framework for almost every type of risk and is partially introducing further elements to be captured in this regards. So far the BCBS has not issued a comprehensive revised framework [Basel IV] as neither published not performed a proper recalibration of the capital requirements based on a proper and thorough quantitative impact assessment. While we agree on some of the proposals and disagree to a lot of others a full judgement can only be made once the comprehensive rule-set is known and the cumulating impacts assessed. Commenting the current bits and pieces issued by the BCBS while certain pieces [treatment of exposures towards sovereigns and the revised framework for the capital charge of operational risks] as well as an appropriate impact assessment is missing it is not really functional. Consequently any revision of the banking rules need to take care for appropriate balance of risk sensitivity, proportionality but also simplicity and stability over time to allow for an adequate judgement of appropriateness. For further arguments see also issue #1 example 2. In this context we want to point out that on the one hand the capital requirements (quantitative and qualitative) have been significantly increased in order to lower their probability of default to save tax payers' money. On the other hand exposures towards those banks (that are associated with a lower probability of default due to higher capital levels and other restrictions in their business) must be backed by higher levels of capital if the proposed revision of the Standardised Approach for credit risk of the BCBS is followed.

b. **Rating Substitution of Collaterals without programme rating**

Reading Article 197 of the CRR literally, only instruments issued by issuers as defined within Article 197 can be used for credit risk mitigation techniques (CRMT) purposes if the instruments as such have a credit risk assessment. Neither the rating of the issuer (e.g. governmental rating) nor a credit risk assessment of a specific issuing programme of that issuer would qualify for the eligibility of that (unrated) instrument. The wording of Article 197 CRR is quiet narrow. However it refers to country ratings based on OECD rules which are always given on issuer and country base only, and which are never related to any debt instrument. Governmental issuers often rely in their debt issuance either on the governmental rating or dedicated program rating (e.g. short term Treasury bills etc.). As such it is quiet common that governmental bonds and short term debt securities are not rated (e.g. Luxemburg central government bonds, Dutch treasuries etc.). Not allowing the usage of such collateral for CRMT for solvency and large exposure purposes would substantially limit the pool of available high quality collateral without properly reflecting the underlying risk mitigation. We kindly ask to allow the proper substitution as described above to fulfil the eligibility criteria as defined within Article 197 of the CRR, even for issues without a rating.

II. Large Exposures

Currently there are some exemptions from the Large Exposures rules and limits with regard to very short term exposures, e.g. Article 390 (6) CRR or Article 400 (1) CRR. Those exemptions are not sufficient and extremely complex. In order to strengthen the financial markets those exemptions should be extended and made easier. In addition, exemptions which are in the national discretion via Article 400 (2) CRR should be standardised and therefore included in Article 400 (1) CRR instead.

The BCBS has proposed a revised framework for large exposures, by this a variety of exemptions have been erased, for others further analysis and discussions were announced. Those rule-set is not appropriate for margins as they often are not due on a daily basis. Overnight exposures resulting from clearing and settlement should also be exempted from the Large Exposures rules[8].

III. Leverage Ratio

We oppose the introduction of a binding and unique ratio, instead the business model must be taken into account. Although we agree to have a simple rule-set we disagree an over-simplification, e.g. for financial market infrastructures (FMIs) in scope of the leverage ratio. A one size fits all leverage ratio is increasing risks instead of mitigating them. Following technicalities are raising our concerns:

- FMIs in scope of the leverage ratio must be excluded, either in general or at least their FMI businesses from the calculation basis.
- Securities Financing Transactions (SFTs) should not be discriminated compared to unsecured loans in case they are under-collateralised.

[8] See recital 18 of EBA/CP/2015/02 “Draft Regulatory Technical Standards on prudential requirements for central securities depositories under Regulation (EU) No 909/2014 (‘Central Securities Depositories Regulation’ - CSD-R)”

- In particular cash margins of CCPs (one of the main driver of balance sheet volume for CCPs) should be excluded from the calculation base of the leverage ratio as those margins are intended to make the financial system more save. Including them in the leverage ratio calculation basis is contradicting the political aim to promote central clearing to reduce the risks in the financial system and consequently save the taxpayers' money in the next financial crisis.

IV. Boundary between Banking Book and Trading Book should be based on trading intention and not product type, process of acquisition etc.

The Basel Committee intends to enlarge the capital requirements for market risks as the current framework seems to have shortcomings in the coverage of these risks. The decision to increase capital requirements for market risks should be derived on possible future price deviations and the correspondent threat of losses. Contrary to that the proposed rules (by BCBS) create a variety of effects which contradict in our view the aim of the overall regulatory framework.

The revised market risk framework is especially redefining the trading book / banking book boundary. In the currently applied framework the intention of a trade to gain short term profits leads to an assignment to the trading book in case certain criteria are met. Instruments not held to gain a short term price deviation are in general assigned to the banking book. The revised framework is more focused on characteristics of a financial instrument whether it should be assigned to the banking book or the trading book. In addition the isolated fact that investments are acquired via a trading desk already leads to a trading book assignment.

The intended enlargement of the trading book scope (i.e. the movement of the boundary between trading- and banking book towards the trading side) does not per-se provide major benefits such as increasing the resilience of credit institutions (beside others). On the other hand a variety of credit institutions (such as the Deutsche Börse Group entities in scope) are exposed to higher operational efforts (and costs) and additional capital requirements from a framework that actually should cover risks these institutions do not even have. Especially credit institutions which are performing only a very limited scope of services (special purpose banks like our group companies) and are due to missing trading intend not facing material market risks will suffer from such a revised framework as it is almost unavoidable to invest in some financial instruments[9] which must be assigned to the trading book under the revised framework.

Please provide us with supporting relevant and verifiable empirical evidence for your example: (please give references to concrete examples, reports, literature references, data, etc.)

-

[9] For example in the context of the needed liquid assets for LCR purposes.

If you have suggestions to remedy the issue(s) raised in your example, please make them here:

- Please do continue to promote financial stability and do not underestimate the risks of interoperability.
- Use the influence of the EU Commission in finalising the revision of the Basel banking framework. Reach comprehensive revised framework and calibrate the requirement in a proportionate manner on an adequate level.
- Transform revised banking rules into EU law taking into account proportionality, different business models and overall adequate levels of risk limitation.
- As the EBA has already confirmed our concerns with regard to the rating of collaterals via EBA Q&A 2013_679, we ask the EU Commission to include this content in the level 1 text, e.g. CRR II.
- In the context of the former bullet point we urge the EU Commission to accept OECD classifications of so called "high income states" (e.g. Germany) as of highest credit quality for collateralisation purposes as for those countries no OECD ratings exist.

Issue #15: Procyclicality

EU rules have been put in place to make the financial system less procyclical and more stable through the business and credit cycle. Please indicate whether some rules have unintentionally increased the procyclicality of the financial system and how.

No DBG Example